THE LAW OF EXECUTIONS.

To which are added,

The HISTORY and PRACTICE

Of the COURT of

KING'S BENCH;

And some CASES

Touching WILLS of LANDS and GOODS.

By the late Lord Chief Baron GILBERT.

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MVSEVM
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PREACE.

THE Editor having met with the Three following Pieces, which may be depended upon as the genuine performance of the late Lord Chief Baron Gilbert, *is ſatisfied there is no occaſion to make an apology to the reader for publiſhing them. The tranſlation of the Writs throughout, and the numerous references,* &c. *he dare ſay will prove acceptable to the Public.*

TA-

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ERRATA.

Page 17, l. 4. for *facias*, read *feci*; p. 18, l. 14. for *him*, read *them*; p. 22, l. 17. for *diſtringuas*, read *diſtringas*; p. 23, dele *Cro. Eliz.* 598. in Margin; p. 24, l. 3. after *for*, add *more or*; p. 355, l. 13. for *and*, read *Defendant may*.

THE

THE LAW OF EXECUTIONS.

THE antient Executions are to be distinguished as they were in the King's Court, in the Courts of inferior Lords; in the King's Court, they could levy the Money itself upon the Party against whom the Judgment was given; in the Lord's Court, they could only levy Distresses, a Pain to force Obedience to the Lord's Commands, and whether they were justly levyed, or not, was to be reconsidered again in the King's Court; for the Lord only taking the Distress as a Pain,

Dalt. ch. 419, 420, 442. Keilw. 106.

Kitch. 226. 227.

Pain, and not being able to ſell without ſpecial Cuſtom, it could be no prejudice to ſuch Execution, to reconſider the Reaſonableneſs of ſuch Caption, by putting in other Pledges.

Dalt. ſh. 419, 420.

BUT in the King's Court, they did not take Goods as a mere Pain to make the Party appear, as they did in the Court below.

FIRST, becauſe the King's Court immediately altered the Property, which the Lord's could not; and the Reaſon why the Lord's could not, was, that when the Lord's commanded the Party to recover, he was ſubject to a Writ of falſe Judgment, and therefore he himſelf was to have the Cuſtody of ſuch Goods, in order to return them in caſe it was recovered.

SECONDLY, if on the King's Writ, they ſhould only have taken the Goods as a Pledge, on the Return, that Pledge would have been forfeited to the King; though they were not to the Lord in the Court below; and on ſuch Forfeiture, the Goods muſt * *de Gratia*, have been given to the Party for Satisfaction, if they had not been immediately levyed to the Parties Uſe, for ſuch Forfeitures were not re-examinable as in the Lords Courts, and therefore created a Forfeiture immediately.

THIRDLY,

* *Of Favour.*

THIRDLY, the Judgment was, that the Plaintiff * *recuperet* the Money adjudged to him, and therefore, the beſt and moſt direct Way of levying the Money, was by bringing the Money itſelf into Court for the Uſe of the Parties.

IN the King's Court, between Party and Party, the Execution was only upon the Goods, becauſe the Debtor was truſted only upon his perſonal Security, and Pledges were taken on ſuch Contracts by other perſonal Goods, as Pledges; or by Means of perſonal Security, as Bodies; and the Judgments being in purſuance of the Contract, were only to recover a perſonal Thing. 3 Co. 11. b. 12.

BUT in the King's Caſe, an Execution iſſued not only againſt the Goods and Chattles, but againſt the Lands, and therefore they conſidered the Debtor not merely as bound in Perſon, but as a Feudatory, who held mediately or immediately from the King, and therefore, holding what he had from the King, he was from thence to ſatisfy what he owed to the King;

AND being conſidered as public Treaſure, it was not to be loſt; if the Subject had any thing, they firſt tried twice to levy on his perſonal Eſtate, before they ſeized the Lands.

* *Recover.*

2 Inſt. 394, 395. Mo. 367. 662, 663.

IT is generally ſaid in the Books, that there was only a *Levari facias*, and a *Fieri facias* for the Subject, in the Caſe of an Execution, which is true; for it is plain, that the *Capias*, and *Elegit* comes in by the Statutes: But at Common Law, they awarded Execution ſometimes by the the Words of * *habeas Denarios*, *facias Denarios*, *fieri facias Denarios*, *levari facias Denarios*; and all theſe Forms were uſed at firſt indiſtinctly, as Words tantamount to the ſame thing: this appears even in the King's Caſe, by the ſeveral Forms yet extant on Record; but afterwards, they began to diſtinguiſh the Writ into two ſeveral Forms, *viz.* the *Fieri facias*, and the *Levari facias*, and confined the Writs to be uſed in diſtinct Caſes. 1ſt. The *Levari* was in the Courts below, for there, they could not word it by a *Fieri* in Proceſs: becauſe they could not alter Property in the Writ; and therefore it was a vain thing to conceive a Writ in ſuch a Manner, as could not be executed; and if there was a Sale, as ſometimes there was, by a Grant from the King, or now by Preſcription; yet ſuch Grants coming in after the Proceſs were ſettled in the inferior Courts;

3 Co. 11, 12. 2 Bulſt. 63. 99.

Finch 471.

* *Have the Money; make the Money; cauſe the Money to be made; cauſe the Money to be levied.*

Courts; the *Levari* is the Form of the Execution; and they have no *Fieri facias*; but however, that the Goods might not be taken as a pain without any Relief to the Subject, there is a Writ * *de Executione Judicii*, on which Writ the Sheriff has Authority to ſell the Diſtreſſes he has taken on the *Levari*, or to take and ſell the Goods of ſuch Recovery; and the Reaſon of this Writ was, to remedy any Colluſion between the Sheriff and the Recoveree, or the inferior Lord and Recoveree; for when they had taken the Goods, they would either keep, or reſtore them as they ſaw Cauſe, and make the Execution ſubſervient to their own Benefit, and not as it was intended, a Pain to make the Party perform the Judgment; and for this Reaſon, the Writ † *de fieri facias Executionem*, was granted to compel the Sheriff to make Execution of the Goods he had in his Hands, and the Judgment having given him Authority to levy, the Writ gives him Power to ſell what is levied; but if there be no ſuch Judgment he muſt return that, on the *Alias*, and *Pluries*, for the Writ is not judicial, or iſſuing from any Record, but is

Reg. 18. F. N. B. 43, 44.

* *For Execution of the Judgment.* † *For cauſing Execution to be made.*

an original Writ, which gives him Authority to execute ſuch Judgment by Sale.

Reg. 152. 153. F. N. B. 308. Dalt. Sher. 442.

THERE was the ſame ſort of Writ at Common Law, which was called a *Si recognoſcat*, which was, where there was a Recognizance in the Sheriff's Court, that it ſhould be levyed * *de Bonis & Catallis*, and thereby give Authority to ſell, which was the Words the *Levari* made uſe of in the Proceſs of their Court.

IN the *Alias*, the Phraſe was † *fieri facias Executionem juxta Tenorem Mandati noſtri*; and ſometimes they had an original Proceſs by *Diſtringas*, which was indifferently made uſe of with the *Levari*; but the *Diſtringas* being the King's Writ, if the Money was not paid, the Goods were forfeited, and therefore they had a *Venditioni exponas*; and though *Fitzherbert* puts a *Quere* on it, yet it ſeems to be Law; becauſe on every *Diſtringas* on the Writ of the King, if the Matter was not performed for which the *Diſtringas* was made, the Goods were forfeited, and they did not in this Writ, as in the ancient Proceſs of the King, make uſe of the Words *diſtringas, levari, & fieri*.

Cro. Jac. 450. Dy. 306. Plow. 441. Reg. 289. 300.

SECONDLY, the *Levari* in the Courts above, was either upon a Recognizance, or

* *Of the Goods and Chattels.* † *Cauſe Execution to be made according to the Tenor of our Command.*

or in the King's Proceſs; the *Levari* was particularly diſtinguiſhed upon the Recognizance; becauſe the Form of the Recognizance was, that it ſhould be levyed * *de Bonis & Catallis, Terris & Tenementis, ad quaſcumque manus devenerunt*, and therefore, the particular Words *Levari*, are choſen upon ſuch Recognizance, becauſe the Words *Fieri* would not have extended to the Lands, as well as the Goods, ſince he was not to alter the Property of the Lands themſelves on ſuch Proceſs, but only to levy it out of the Profits. F. N. B. 593. 594.

In the King's Caſe, the firſt Proceſs runs by way of *habeas*, which was one of the Words anciently uſed in Executions, and they choſe this Word, which was an Expreſſion of a Summons to give Notice to *have* the Money, and likewiſe gave Authority to the Sheriff to levy it, that the Debtor might not make away the Goods to defraud the King; for by *Magna Charta*, the Land of the Debtor could not be ſeized, nor his Security ſued, if there were Goods and Chattles of the Principal to ſatisfy.

In Caſe of the King the ſecond Proceſs was a *Levari*, and they made uſe of this

* *Of the Goods and Chattels, Lands and Tenements, into whoſoever Hands they came.*

Word, becauſe the Proceſs was to run not only to the Goods, but on the Profits of the Land itſelf, and herein likewiſe they inſerted the *Capias* on the Perſon; becauſe it appeared on the Sheriff's Return on the Summoniter's Proceſs, that he had no Goods to ſatisfy the Debt; and in that Caſe, the Body was liable by the Prerogative of the King; for though in a private Caſe, the Body was not liable to ſatisfy the Debt, becauſe the King had a Right to the Service of his Body, yet when it was for the ſake of the Public, as for imbezzeling the public Treaſure, the Body was liable.

THE third Proceſs in Behalf of the Crown was, extending the Lands; for the Lands themſelves being held mediately or immediately from the King, were as much ſubject to the King's Demands by the Judgment of his Court, as if there had been a Reſervation on the original Tenure; and therefore bound the Lands from the Time of the Record of ſuch Debt before the Execution iſſued; for if they had not determined, that the Record would have bound the Lands themſelves, as firmly, as if it had been in the feudal Patent, then it would have happened, that the Subject, by an Alienation of his Land, might have defeated the King's

Execu-

Execution, which must frequently happen, since the King was to give Notice before he could seize the Land itself.

THIRDLY, having thus considered the *Levari*; the last thing to be mentioned is, the *Fieri facias* upon the Judgment at the Parties Suit; and here the Words *fieri facias* were chosen to distinguish this sort of Execution; because it was only * *de Bonis & Catallis*, and not to be raised from the Profits of the Lands themselves; and the Words, *fieri facias* in the several ancient Sorts of Executions, were the propereſt to be made use of on a Judgment against the Party; for the Goods only were liable to an Execution, and from hence forward, they never sent Execution against the Goods by the Words *Levari*, but on the *Fieri* only, and the Word *Levari*, on the * *Bonis & Catallis*, became obsolete, unless in the Case of a *si recognoscat*, where for the Reason above mentioned it remains till this Day; and *Westm.* 2. *cap.* 18. which gave the *Elegit*, having mentioned the Election to be on the *fieri facias*, or on the Application of the Goods and Lands, has affirmed this Distinction, and pinned down the Difference then taken, and has made the *fieri facias* a specifick Writ for an Execution

13 Ed. chap. 18. See 2 Inst. 395.

* *Of the Goods and Chattels.*

cution on the Judgment, and the *Levari* for the Recognizance; but the *Levari* remains for the Recognizance; notwithſtanding the Word of the Statute; becauſe the *Levari* is to charge the Profits of the Land, as well as the Goods and Chattels, and therefore Proceſs on the Recognizance could not be by *fieri facias* only.

HAVING thus conſidered the Nature of the ancient Executions, we come now to the Time in which Judgments at Common Law were to be executed, and how revived; a Man by Judgment, authenticated his Debt, and it gave an Authority to the Party to ſue his Execution within a Year and a Day; but if he did not, it was preſumed to be paid, and after that time the Law allowed him to plead Payment, and a Releaſe of ſuch recorded Debt; and the Reaſon was, becauſe all Judgments were to be rendered effectual within a competent Time, which was the ſame as in the Cauſe of none Claims, *viz.* a Year and a Day; and therefore the Pledges that were put in for the Principal * *ad ſtandum Recto*, were amerciable, as well as the Principal, during the Year and the Day; and thoſe Amercements were iſſued in Proceſs by the Officers during that Time

* *To have Juſtice.*

Time by *Levari facias* in the Lord's Court, and *Fieri facias* in the King's Court; and if the Party had paid the Money, and ſatisfied the Amercements, the Judgment ſtood in full Force, and the Party could plead nothing on an Execution taken out after ſuch Payment; becauſe the Judgments and Amercements did not appear to be ſatisfied, and therefore the Party was put to his *Audita Querela*, in which the Execution was diſcharged; but the Judgment ſtill remained in Force, as not being annulled by the Return of a regular Execution, or by the Entry of an Acknowledgment of Satisfaction upon Record; but at Common Law, the Party, nor his Pledges ſtood to any Execution ſued out, or Amercement affeered within the Year and Day, and therefore if the Party had not got Execution. nor the Court affeered, nor the Officer levyed the Amercement, there was an End of all Proceedings by way of Execution on the ſame Judgment; but they might bring an Action of Debt on that Judgment, or Debt for that Amercement, if it were affeered within the Year; and in ſuch new Actions, there were new Pledges to be put in upon the Default of the Defendant's appearing on the firſt Summons, and the Defendant might plead a Releaſe;

becauſe

becauſe under Seal, ſubſequent to the Judgment, as a Bar to the Action upon that Judgment, and he could have no Execution at Common Law; after the Year was out, he could not have pleaded Payment, for that would have been puting it on the Oaths of Men, to overturn the Validity of the Judgment.

21 Ed. 4. 6.

THIS Time of Limitation of Judgment, was not only in perſonal but real Actions; for though the Judgment on a real Action ſettled the Right of the Land for ever, as in the perſonal it did the Right of the thing in Demand; yet that Judgment could not lie dormant for ever, to be executed at any time; for then dormant Judgments would over-reach Conveyances between the Parties, and therefore there was but a Year's time to execute ſuch Judgment, which Judgment over-reached all Conveyances, and forced the Party to his *Audita Querela*; but after the Year, the Judgment over-reached nothing; but he was put to his *Scire facias* on that Judgment, and not to his Action, for the Right of the Land had been already determined, and therefore it was only to revive the Determination touching the Lands, unleſs ſomething had been done by intermediate Conveyances; and ſo upon Annuities which were

were formed upon the Model of Freeholds; the Right of ſuch Annuity was ſettled in one Writ, and revived by *Scire facias*; but in Debt, if the Judgment was not executed, the Debt was preſumed to be paid when the Judgment loſt its Force, and therefore the Law gave no *Scire facias*, but a new Action.

We now come to the Diviſion of Executions, which in Matters perſonal is,

1. Fieri Facias.
2. Levari.
3. Elegit.
4. Capias and Proceſs to Outlawry.

In Matters Real.

1. Habere facias Seisinam.
2. Habere facias possessionem.

And then we ſhall conſider when a *Scire facias* is neceſſary to revive a Judgment, and warrant the ſeveral Sorts of Execution.

First of the Fieri facias.

This Writ at Common Law, bound the Defendant's Goods from the *Teſte* of the Writ, ſo that any Sale after that was void, becauſe the Goods from the time of

8 Co. 171. Cro. Jac. 451. Cro. El. 174. Lev. 173. 174. Sid. 271. 2 H. 4. 14. 9 H. 6. 57. 58.

of the *Teſte* were attendant to anſwer the Execution; for the Execution at Common Law being only on the Goods, if they had not allowed the Goods to be bound, as if the Party had transferred them, they thought every Execution might be avoided by Sale; and 'twas preſumed, that the Sheriff ſhould execute ſuch Writs immediately, and that there would be Notice in the Neighbourhood, that they might not be deceived; but the Goods were not bound by the Judgment; becauſe the Judgment was in force for a whole Year; and it would be hard, that none againſt whom Judgment was pronounced, ſhould buy or ſell within that Time; but Men abuſed the Notion of the Retroſpect of the Goods being bound by the *Teſte* of the Writ to make Sales uncertain; for they took out Writs one under the other, without delivering them to the Sheriff, by which they bound the Goods of their Debtors, and conſequently made their Sales, and all Commerce uncertain; to prevent which the Statute of Frauds and Perjuries bound the Goods only from the Delivery of the Writs to the Sheriff, which was no more than reſtoring the old Law, which ſuppoſed the Writ to be delivered to the Sheriff immediately from the *Teſte*; but if a

[a] 29 Char. 2. ch. 3. made perpetual by 1 Jac. c. 17. Sect. 5.

frau-

fraudulent Sale was made before the *Teſte*, it is bad by 13 *Eliz. cap.* 5; and Badges of ſuch Fraud are, where the Defendant ſtill continues in Poſſeſſion, or where the Deeds are made ſecretly of the Sale of all Goods and Chattels; in ſuch caſe, though the Sale be for a valuable Conſideration, yet if it is not made * *bonâ fide*, for a valuable Conſideration, it is not good, ſince the Conveyances are not made to transfer the Property, but to protect the Goods in the Hands of the Defendants againſt the Execution of Strangers; but if the Deed is executed the ſame Day with the Execution, the Execution ſhall take place without Inquiry of the Fraud of the Deed; for the Law allows no Fraction of Days, and therefore the Goods are bound from the very Beginning of the Day in which the Execution is teſted. By virtue of this Writ, the Sheriff on the Seizure of the Goods, had ſuch a Property in them, that he could maintain Treſpaſs, or Trover; for he had the Goods to ſell, that he might have the Money in Court; and therefore, when he had ſeized the Goods, he had the Property in them for that Purpoſe; and if the Defendant dies after the Teſt, either before or ſince the Statute of Frauds, the

Cro. El. 440.

2 Saund 47.

Lev. 282.

2 Vent. 218. Salk. 222. Comb. 33. Cro. Eliz. 181. Mod. 188. Ld. Raym. 695. 2 Ld. Raym. 808, 850, 1073. 12 Mod. 130, 241.

* *Honeſtly.*

the *Fieri facias* may be executed on the Goods in the Hands of the Executor, becauſe the Sheriff was intitled to ſeize them from the time of the Writ, and therefore the Death of the Parties made no Alteration in the Title; but the Sheriff might ſeize them into whoſe Hands ſoever they came; and the Statute was made only for Strangers, not for the Executor.

Noy. 107, Lutw. 589.
12. Mod. 385.
2 Show. 87.
3 Lev. 203, 204.
Sir Tho. Jones, 97.
Freem. Rep. 453, 482.
Skin. 655.
5 Mod. 296.
2 Show. 139.
Cro. Eliz. 404. pl. 13.
12 Mod. 230.

No Payment to the Party will diſcharge the Sheriff's Power by the Writ, becauſe he is commanded by the Writ to have the Money in Court, there publickly to pay the Party, which cannot be ſuperſeded by any private Agreement between the Parties, ſo that if there be Payment by the Sheriff to the Plaintiff, with an Acquittance ſubſequent to the *Teſte* of the Writ, and before the Return, that cannot be ſet up to diſcharge the Sheriff, if he returns on Record *Fieri facias & paratum habeo**, unleſs the Acquittance be pleaded as an Eſtopel and totally relied upon.

Godb. 147. pl. 188. Hob. 206.
2 Show. 87. pl. 78. *contra*, ſee 3 Lev. 204.

If the Sheriff levies the Money on the Defendant, and delivers it to the Plaintiff, unleſs it be paid into Court, the Plaintiff, is not eſtoped from having a new Execution, for the Money being by the Writ to

* *I have cauſed to be made.*

to be paid into Court, the private Payment is no Satisfaction, for the Writ is not obeyed; and if the Sheriff return *Fieri facias*, and do not pay the Money into Court, the Plaintiff has his Choice of a new Execution againſt the Defendant, or a *Diſtringas*, or a *Fieri facias*, or *Elegit* againſt the Sheriff; becauſe he has acknowledged the Debt on Record, which is tantamount to Judgment by Confeſſion; and therefore the Judgment may be executed againſt himſelf.

If the Sheriff pays the Plaintiff's Demands out of his own Pocket, he may yet levy it on the Defendant's Goods, for the Authority given him by the Writ does not ceaſe by ſuch Payment; but if the Defendant pays the Money to the Sheriff, this is a good Diſcharge, for then the Sheriff has made the Money of the Defendant's Goods according to the Commands of the Writ. Hob. 207.

The Sheriff is by the Writ, commanded to levy the Debt * *de Bonis & Catallis*, and is therefore indemnified as far as he acts neceſſarily in order to the taking of the Goods, and therefore, if he breaks open a Cheſt in which Goods are locked up, or a Barn not adjoining to a Dwelling-houſe, which is made for the Sid. 189. Keb. 698. 2 Show. 87. Palm. 54.

C Con-

* *Of the Goods and Chattels.*

Conſervation of Goods only, he is indemnified by the Writ; but he is not by the Writ authorized to break the Dwelling-houſe, which is built for the Protection of the Man, and his Family; if he gets into the Houſe, the Doors being open, there begins the Execution, for the reſt of the Houſe is only for the Protection of the Goods, and therefore he may enter and finiſh the Execution of his Writ: but though the Sheriff be a Treſpaſſer in the Execution of the Proceſs, yet when the Writ is ſerved, and the Money levied, the Plaintiff ſhall have the Benefit of it, and the Party is left to his Remedy againſt the Sheriff.

Brownl. 50. 5 Co. 91. 3 Inſt. 162. Mo. 668. Yelv. 28. Cro. Eliz. 908. Dalt. Sher. 350.

BUT the Protection of a Man's Houſe extends only to himſelf and Family; for if a Stranger, to elude the Execution, receives the Defendant's Goods into his Houſe; there the Sheriff's Authority ſhall reach them, becauſe a Deſign to elude the Law ſhall not be protected by the Law; the Sheriff might ſeize him in the Stranger's-Houſe, becauſe the Defendant's leaving his own own Houſe has waved the Benefit of the Law.

THIS protecting a Man in his own Houſe, was very agreeable to the ancient Law; becauſe in perſonal Contracts, they did only ſubject their Chattels, and not their Perſons, nor Freeholds; and though after-

afterwards, by ſubſequent Laws, the Freehold, and Perſon were made liable to Execution, yet they have not taken away the Privilege a Man had by Common Law to defend his own Houſe, which ſtill continues; but where the Execution is by * *Habere facias Seiſinam & Poſſeſſionem*, he may break open the Doors, becauſe the Command is to deliver the Freehold to the Plaintiff, which by the Judgment of the Law has been adjudged to be the Plaintiff's, and not the Defendant's.

By this Writ the Sheriffs have Authority to ſeize every thing that is a Chattel, *viz.* Leaſes, and † *Fructus Induſtriales*, as Corn growing, which goes to the Executor; but Furnaces, Apples upon Trees, which belong to the Freehold, and go to the Heir, theſe cannot be ſeized by the Sheriff on this Writ; becauſe they are not ‡ *Bona & Catalla*, and conſequently not within the Authority of the Writ, and at Common Law the Freehold could not be touched by an Execution. Dalt. 145. Owen 70, 71. Cro. Jac. 73. 4 Co. 74. Dy. 363.

The Sheriff has by this Writ Authority to ſell a Term for Years; but if he miſtakes in reciting the Commencement, and End of the Term, this is no Sale; be-

* *Cauſe to have Seiſin and Poſſeſſion.* † *Fruits of Induſtry.* ‡ *Goods and Chattels.*

cauſe a Term ought to have a certain Beginning, and a certain End; and if he miſtakes the Commencement or the End of the Term, he does not ſell the ſame Term that was veſted in the Defendant, and therefore the Sale is void.

But if he ſells it with the general Words, "All Title, Eſtate, Right, and Intereſt of the Defendant," the Sale is good, though there be a Miſtake in the reciting of the Commencement, or End of ſuch Leaſe; for the Sheriff has the ſame Authority to ſell the Defendant's Goods in order to execute the Judgment, and pay the Defendant's Debts, as the Defendant had over his own Property; and therefore, as ſuch general Words would have paſſed his Chattels from the Defendant, ſo it ſhall in the Caſe of the Sheriff, who is to ſatisfy the Defendant's Debt: ſee how it is in an *Elegit* hereafter: if the Sheriff ſells the Term by Virtue of a *Fieri facias*, and the Judgment is reverſed by Writ of Error, the Defendant ſhall not be reſtored to the thing *in Specie*, but in Money, for which it was ſold; for the *Fieri facias* gave the Sheriff Authority to levy the Money **de Bonis*, ſo that he was obliged to turn the Goods of the Defendant into Money, and therefore, the Reſtitution muſt

* *Of the Goods.*

muſt be of what the Execution had taken from him, which was Money; and not of the Term itſelf, for then no Body would buy; and therefore a Stranger's Intereſt, which comes to the Term by due Courſe of Law, cannot be affected by Reverſion of a Judgment between the Parties to which he is in no wiſe privy.

THE Sheriff is bound at his Peril to take only the Goods of the Defendant; and if he doubts whether the Goods ſhewn him are the Defendant's, he may ſummon a Jury * *de bene eſſe*, to ſatisfy himſelf whether the Goods belong to the Defendant or not; this will juſtify him in returning, that the Defendant has no Goods within his Baliwick, and mitigates Damages in an Action of Treſpaſs, if the Goods ſeized ſhould not happen to be the Defendant's. Dalt. 146.

THE Sheriff on this Writ may return, that the Goods remained † *in Manibus pro Defectu Emptorum*, and this Return is good, becauſe the Sheriff is directed to levy the Money from the Goods, which implies an Authority to ſell them; yet he may not be able to find Buyers, and therefore, ſuch Return is to be allowed; but after this Return, a *Venditioni exponas* may iſſue, to give the Sheriff further Yelv. 44. 2 Saund 344. Mo. 30. Ventr. 52. Lev. 282. Sid. 438. 2 Saund. 47. Mo. 751.

* *Conditionally.* † *In Hand for want of Buyers.*

Power to ſell after the firſt Writ is returned, and to oblige him ſo to do; for though he may ſell after the Return, ſince by the Seizure he had the Property of the Goods in order for Sale; yet he is not obliged to ſell without this Writ, and therefore it iſſues out, in order that the Sheriff may bring the Money into Court; the old Sheriff may ſell by Virtue of the *Fieri facias* after he is out of the Office, without a *Venditioni exponas*; for by the Seizure, he is anſwerable for the Value of the Goods to the Parties; though if he returns, that they may be upon his Hands for want of Buyers, this is a good Return; but if he does not ſell them, there ſhall iſſue a *Diſtringuas* to the new Sheriff, to diſtrain the old one, till he ſells them, and pays him the Money over, which he is to have in Court; but no *Venditioni exponas* goes to the old Sheriff, becauſe he ceaſes to be an Officer of the Court.

Saund. 164. 165.

Cro. Jac. 514. 515.

Godb. 276.

When the Seriff has by Virtue of the *Fieri facias* ſeized any Goods, the Property of the Goods is altered by the Authority of the Law, and therefore if a Writ of Error be brought, and a *Superſedeas* iſſues, it does not hinder the Sheriff from proceeding to ſell on ſuch Execution, and he may do it after ſuch *Superſedeas*,

ſedeas, which is no more than a Reſtraint from proceeding on that Writ, if he has not already proceeded upon it, and is not a Writ of Reſtitution to reſtore the Goods, if he has already altered the Property, and therefore if the Property is altered he is at Liberty to proceed according to the Command of the firſt Writ, ſince the Property was altered by ſuch Writ, before the *Superſedeas*; but if the *Superſeadeas* had iſſued, * *quia improvide*, there the Defendant ſhould have been reſtored to his Goods; for ſuch *Superſedeas* is in the Nature of a Reſtitution, for it ſets aſide the *Fieri facias*, becauſe it iſſued irregularly: if the Sheriff has ſeized Goods on the *Fieri facias*, though the Plaintiff in Error has a *Superſedeas* afterwards, by which the Sheriff is ordered to ſtop further Execution, yet the Property of the Goods being altered by the Seizure, the Sheriff may ſell them, as we have already ſaid, and if he does not, the Court will award a *Venditioni exponas*, even though the original Record be removed; for upon filing the *Fieri facias*, there is a Record in Court ſufficient to ground further Proceſs upon.

If the Sheriff returns that he has Goods to the Value of 72*l.* which remain

Cro. El. 598. Cro. Jac. 515. Godb. 276.

* *Becauſe irregularly.*

main in his Hands * *pro Defectu Emptorum*, it is no Eſtopel, but that he may ſell them for leſs; for it appearing on the Return, that they are not ſold, but that they remain in *Specie* in his Hands, the Value cannot be ſo ſet, but that it may be altered between that and the Sale; therefore, if on the *Venditioni exponas* it appears, that he has ſold thoſe Goods for leſs, the Plaintiff may have a new Execution for his Debt.

Cro. Jac. 515. Godb. 276. Hob. 205, 206. Danv. Abr. 79.

BUT if the Sheriff returns, that he has taken † *Catalla* to the Value of 100*l.* and they die afterwards for want of Meat, the Plaintiff ſhall have the Value from the Sheriff, becauſe by the Sheriff's own Default, it is become impoſſible, that it ſhould be reduced to any other Certainty, than what is mentioned on the Return.

IF a *Fieri facias* iſſues, on which the Sheriff ſeizes Goods, and makes no Return, 'tis illegal to iſſue a ſecond *Fieri facias*; for the Plaintiff ought to follow the firſt Execution on which the Property of the Defendant's Goods were altered, and get a Return of the Writ; and if he iſſues a new Execution it is erroneous; becauſe the Defendant is not to be doubly charged by the Judgment, and the former Execution having altered the Property of the Goods

* *For want of Buyers.* † *Cattle.*

Goods to the Value, the Judgment from that time is no Lien upon the Defendant; and therefore, if the Plaintiff iſſues a *Fieri facias* within the Year, on which there is no Return, but the Sheriff has levyed Goods to the Value, and afterwards brings a ſecond *Fieri facias*, an Action will lie againſt the Plaintiff. Godb. 147. 276.

If the Sheriff takes Goods on an Execution, he cannot return *Reſcous*, becauſe he ought to have taken the *Poſſe Comitatus*, for which ſee *Hiſt. Common Pleas*, p. 23. Wherever the Sheriff returns a Seizure of the Goods, a *Scire facias* lies againſt him; and ſo if he returns a Reſcue; becauſe by that Return he charges himſelf with the Seizure; for it appears, that the Sheriff has levied the Goods of the Defendant; ſo that the Judgment is no Lien upon the Defendant's Goods. Weſt. 1. cap. 17. 2. Inſt. 193. Weſt. 2. cap. 39. 2. Inſt. 418. Cro. Jac. 419. Godb. 276.

But if the Sheriff returns a *Capias* to Part only, a *Scire facias* will lie for that Part, and *Fieri facias* for the Reſidue. 2 Saund. 344. Cro. Car. 539.

If the Sheriff levies the Money upon a *Fieri facias*, though he makes no Return upon the Writ, yet an Action of Debt, Account, or *Aſſumpſit* lies againſt him, and his Executors; becauſe it is a Debt in the Sheriff by the levying the Money, and the Defendant by the Sheriff's levying the Money upon him, can on a *Scire* Sir Wm. Jones, 430. Rol. Abr. 598. 921.

Scire facias to have Execution, plead this in Bar, or upon a ſecond *Fieri facias*, relieve himſelf by an *Audita Querela*; for the Lien of the Judgment is diſcharged, by the Sheriff's executing the Writ, and if the Plaintiff had not this Action againſt the Sheriff, he would be remedileſs.

Cro. El. 344. Mo. 598. pl. 819.

If the Sheriff has levied Part of the Debt, as ſuppoſing the Debt to be 400 *l.* and 100 *l.* is levied, if a ſecond Execution iſſues for the whole Sum, this is erroneous; becauſe Part of the Judgment was diſcharged, and therefore the ſecond Execution ought to recite, how much was levied, and to command the Levying of the Reſidue.

Off. Brev. 97. Dalt. 219. Sid. 276.

If the Sheriff return * *nulla Bona*, but that the Defendant is † *Clericus beneficiatus, non habens laicum Feodum*, then there goes a *Levari facias* to the Biſhop, ‡ *quod de Terris & Catallis eccleſiaſticis levari faciat* the Debt, and then it ſeems, that the Biſhop ſets out the whole Profits, except what is neceſſary for the Cure, to ſatisfy the Debt; but if the Biſhop returns, ‖ *quod nulla habet Bona eccleſiaſtica*, an Action will lie for the falſe Return, and the Court will not allow him to amend it.

Of

* *No Goods.*

† *A beneficed Clergyman, having no Lay Fee.*

‡ *That he cauſe to be levied of the eccleſiaſtical Goods and Chattels.* ‖ *That he has no eccleſiaſtical Goods.*

Of the LEVARI.

THIS is the moſt ancient judicial Proceſs of the Law, though it now continues only in three Caſes; *viz.* in the County and Manor Court, Recognizances in *Chancery*, and a Recovery againſt the Heir on the Lands of his Anceſtor by Deſcent. Bract. 440. F. N. B. 265. 266. Reg. 300.

THIS Proceſs appears in the Books under ſeveral Names, but ſtill amounts to the ſame Thing; in meſne Proceſs, it is called an Attachment of Goods and Diſtreſs infinite; but in Executions it is always called a *Levari*; and it is to be known, that the Executions at Common Law were only a Pain or Seizure, to compel the Party to do the thing commanded, and the Command to levy the Money adjudged, was only a Command to diſtreſs the Parties in their Goods and Chattels, Lands and Tenements, till they had obeyed; ſo that the Words of the old Writ are, * "*Precipimus tibi quod diſtringas* "*B. per Terras, & Catalla, ita quod nec* "*ipſe nec aliquis pro eo nec per ipſum Ma-*"*num apponat Terris, Tenementis, Bladis,* "*nec*

Levari the ſame as Attachment and Diſtreſs infinite.

* *We command you to diſtrain B. by his Lands and Chattels, ſo that neither he nor any one for him or by him, put their Hands upon the Lands, Tenements, Corn, or other Chattels.*

" *nec aliis Catallis*;" Or thus, " * *Ita* " *distringas eum per Terras & Catallas* " *quod capias omnes Terras & omnia Ca-* " *talla sua in Manum Domini Regis, de-* " *tineas quousque Rex aliud inde precepe-* " *rit & de Exitibus respondeat Domino* " *Regi.*" and in this Case, they at last came in the King's Courts to give more effectual Remedy than was given in any other, † *adjudicare querenti Debitum petitum*; from hence in Executions they went one Step further, to command the Sheriff to levy a certain Sum mentioned in the Judgment, by which the Sheriff had Authority not only to seize, (which was done at Common Law) but likewise to sell the Goods so levyed in order to pay the Plaintiff his Money; and this more modern way of transacting the *Levari*, is what still continues in the superior Courts, as being the most commodious; but in the inferior, where they cannot alter the Property, the ancient Way of levying as a Pain, continues to this day; and if the Sheriff in the King's Court, cannot on the *Levari* find Buyers, there shall issue a

* *That you so distrain him by his Lands and Chattels, that you take all his Lands and all his Chattels into the King's Hands, and keep them till the King shall give other Command touching them, and let him answer the Profits to the Lord the King.*

† *To adjudge to the Plaintiff the Debt in Demand.*

a ſecond *Levari* to levy the Money for the Goods ſo taken, and the Reſidue from the other Goods of the Defendant. We will now ſee,

1ſt. How the *Levari* ſtood in the Court of the Manor, or hundred Court; and here the *Levari* is only a Pain to make the Party perform the Judgment, and the Sheriff cannot in ſuch Caſe deliver the Goods to the Party, as he can in the King's Court, but the Goods muſt be kept in Safeguard till the Defendant has ſatisfied the Plaintiff the Condemnation-money, unleſs it be, where there is a Preſcription to iſſue a *Levari*, and thereon to ſell the Goods, as often there is in the King's Hundred; and if there be a Writ, * *de Executione faciendâ*, the Sheriff, or Bailiff of the Hundred may ſell the Goods ſo taken by Diſtreſs, and ſo if a Debt be acknowledged in the Sheriff's Court, the Sheriff may ſell on a *Recognoſcat*; but in meſne Proceſs, the Goods are not forfeited on the *Levari* in the Lord's Court, as we have already taken notice of in Title *Replevin*.*

Kitch. 227.

2 Lut. 1371. Dalt. Sher. 442.

2d. This ſort of *Levari*, is on a Recognizance in the high Court of Chancery, and this returned into the Court of Chancery; becauſe it is an old original Writ, that iſſued

* *For doing Execution.*

* *Gilb. Law of Diſtreſſes, &c. p.* 25, 26.

iſſued upon a Recognizance made to the King, or to the Party in that Court, which running in the Form of a *Levari*,
13 Ed. chap. 18. was not altered when the *Stat. Weſtm. 2d. cap.* 18. broke the Executions into two diſtinct Forms, of *Fieri facias*, and *Elegit*; and ſo it continued afterwards, that the *Fieri facias*, and *Elegit* were judicial Writs in the other Courts; but the original *Levari* ſtill remained in the Court of *Chancery*, being not removed, altered, or taken away by that Statute; but the *Fieri facias*, and *Elegit* being a much better manner of Execution, the *Levari* became obſolete in other Courts, though they uſed the *Elegit* in the *Chancery*, upon the Words of *Weſtm. 2d.* * *Si debitum fuerit recognitum in Curia Regis*; but though on the *Levari* they anciently ſold the Goods in the Court of the King, and aſſigned them over ſometimes to the Party, † *ſecundum Quantitatem Debiti*; yet they had not uſed the Way of Apraiſ-
11 or 13 Ed. ment. But the *Statute of Acton Burnel*, was the firſt that put this in Practice, which ſays, that the Goods ſhould be appraiſed, and delivered over to the Party according to the Appraiſment; this ſucceeded ſo well, that by the Statute of
13 Ed. chap. 1. *Weſtm. 2d. cap.* 1. they uſed it in all Caſes, either

* *If the Debt be acknowledged in the King's Court.*
† *According to the Quantity of his Debt.*

either to ſell them upon the *Fieri facias*, or to deliver the Goods at a Price, upon the *Elegit*; and from hence forward the *Levari* was of no Uſe, but as an original Writ iſſuing out of *Chancery*.

We muſt here note, that no *Capias ad ſatisfaciendum* lies on Recovery upon this Recognizance, becauſe the Debtor by the very Words of the Recognizance has ſubjected his Goods, Lands, and Chattels only, not his Perſon.

3d. The ſpecial *Levari* againſt the Heir, where the Lands are delivered to the Creditor at a Price * *donec Debitum inde levaveret*; and this is, where the Heir confeſſes the Debt, and the Particulars of the Aſſetts deſcended; and this ſeems to be a Writ formed by the Judges upon the Model of *Acton Burnel*, and the *Elegit*; but it is properly a Writ at Common Law, and therefore, is rather a ſpecial *Levari*, to levy the Debt upon the Lands, than an *Elegit*, though ſome time by the Books called a ſpecial *Elegit*; the Value of the Lands being to be ſet by a Jury, and is properly called ſo at Common Law; becauſe it was formed in this Caſe by the Judges, to give a Remedy, in caſe that was out of thoſe ſeveral Statutes; for where a Man binds himſelf, and his Heirs, the Heir being named in the Obligation,

* *Till he ſhall have levied his Debt on them.*

ligation, is obliged as well as the Anceſtor, and therefore, if he ſays nothing, or pleads a falſe Plea, he makes the Debt his own; becauſe he is preſumed to have received the Value of the Obligation; but ſince he is only Debtor in reſpect of the Land, therefore if he confeſſes the Debt, and ſhews the Creditor the Land which is his Debtor, he diſcharges his own Perſon, and Effects, ſince he gives up that to the Creditor, for which he is bound in that Obligation; and hence on this Caſe, the Judges had Authority to make out ſuch Writs, becauſe the Heir in his Plea ſet forth the Land ſubject to the Debt.

Elegit.

13 Ed. chap. 18. This Writ is given by *Weſtm.* 2. *cap.* 18. for by Common Law the Land was

2 Inſt. 394, 395. not liable to any Debt, not only, becauſe the Debt was contracted upon the perſonal Security, but alſo, that the Lord might not have a Stranger put upon him; but thoſe only were to enjoy the Land, who came by feudal Donation; but this Statute gave Election to the Plaintiff to ſue a Writ * *de Fieri facias de Bonis & Catallis Debitoris*, or that the Sheriff ſhould deliver

* *To cauſe to be made of the Goods and Chattels of the Debtor.*

deliver to him all the Goods and Chattels of the Defendant, * *præterea Boves, & Afros de Carruca, & Medietatem Terræ ſuæ quouſque Debitum fuerit levatum per rationabile Pretium & Extentum.*

By this, two Things are done,

1ſt. The Goods and Chattels of the Defendant are delivered to the Plaintiff.

2dly, The Moiety of the Lands and Tenements.

First, the Goods and Chattels, and they are delivered † *per rationabile Pretium*, as the Lands are ‡ *per rationabile Extentum*; but Terms for Years, which are Chattels real, and an Intereſt out of Lands and Tenements, may be delivered as Chattel, † *per rationabile Pretium*, or as Profit out of Lands ‡ *per rationabile Extentum*; and hence if a Term for Years be extended, and valued at a certain Value in groſs, and delivered to the Defendant, and the Debt is more than levied out of the Profits of other Lands, and of the Term, yet he ſhall not account for the Profits of the Term, nor deliver up the ſame; becauſe he had it at a ſtated Price by the *Elegit*, and the Lands and the Tene-

D ments

* *Except Oxen and Beaſts of the Plow, and half his Land, until the Debt ſhall be levied by reaſonable Price and Extent.*

† *By reaſonable Price.*

‡ *By reaſonable Extent.*

ments were only for the Remainder of the Debt, and therefore, the Profit of them will only go towards ſatisfying ſuch Remainder; and for theſe laſt Profits only, the Plaintiff ſhall be anſwerable; therefore ſome of the Books ſay, that a Chattel, or Term for Years may be ſold, which is true in one Senſe, *viz.* that they may be ſold to the Plaintiff for the Price ſettled by the Jury, and if the Defendant tenders the Money to the Sheriff before Delivery, or to the Court before the actual Delivery by the Sheriff, ſuch Goods are ſaved; and if afterwards delivered, he ſhall be intitled to his *Audita Querela*; but if there is no Tender made, the Property of the Goods are altered by the Delivery of the Sheriff, and the Plaintiff may diſpoſe of them under the Judgment.

Cro. El. 584. Hob. 58.

Moor 873. pl. 1216.

But if a Writ of Error be brought, and the Judgment reverſed, the Goods in *Specie* ſhall be reſtored, and not the Value; but upon a *Fieri facias*, the Value, and not the Goods in *Specie*; and the Reaſon of the Difference is, that on the *Fieri facias*, the Sheriff is to ſell to any Buyer, but in the *Elegit* he is only to deliver it to the Plaintiff; therefore when the Writ of Error has reverſed the Judgment in the one Caſe, the Defendant is reſtored to the Money, in the other to the

Rol. Abr. 778. Godb. 27.

Mo. 573. pl. 788. Yelv. 180. Dyer. 363. pl. 24. Cro. Jac. 246, 247. Cro. El. 278. 584. Jenk. Cent. 264, pl. 66. Palmer's Caſe 4. Co. 74.

the Goods themſelves; for he is to be reſtored to what he has loſt by the Writ as it was awarded, which in the Caſe of a *Fieri facias*, was the Money, but in the *Elegit*, the Goods themſelves delivered over to the Plaintiff. 2 Lev. 92. pl. 115. 5 Co. 90.

BUT if a Term be delivered by * *rationabile Extentum*, at an annual Value, and not at a Value in groſs, then the Plaintiff is accountable for all the Profits he receives out of the Term upon ſuch Extent; and if he receives the Debt out of ſuch Term before it expires, the Defendant ſhall be reſtored to the Term itſelf. Hoe's Caſe 5 Co. 706. 896. Leon. 96. 3 Leon. 98. Gouldſb. 103.

IF there be an *Elegit* ſued out, and the Sheriff delivers a Term, † *diverſorum Annorum ad tunc proxime futurorum*, this is not good, whether it be ‡ *per Pretium vel Extentum*, becauſe the Sheriff is to deliver this according to a reaſonable Price, or Extent ſettled by the Jury, and this he cannot do, if he does not know the Commencement, and End of it, nor can he ſettle it by a reaſonable Extent, becauſe there is no Certainty when the Term will end, nor how far it will aid the real Eſtate if extended; and this is not like the Caſe of a *Fieri Facias*; for on a *Fieri facias*, the Palmer 274. Cro. El. 584.

* *Reaſonable Extent.* † *Of ſeveral Years then next coming.* ‡ *By Price or Extent.*

Sheriff ſells the Term to a Stranger, who takes it at his Peril, be the Intereſt of the Term more or leſs; and therefore by the Conveyance of all his Intereſt, that is ſufficient; but the beſt Bidder is the Perſon that ought to have the Intereſt, be it more or leſs; and it is the Defendant's own Fault that he does not pay the Money to the Sheriff to ſave his Eſtate, from ſuch Occaſion; but in an *Elegit*, the Sheriff delivers the Term to the Plaintiff himſelf at a Price, or Extent, which Price, or Extent muſt be ſhewed to the Court, to ſee how much is levied by ſuch Chattle, or when the Plaintiff will be ſatisfied by the annual Appropriation; and therefore, if the Duration of ſuch Term be not found by the Jury, there is not ſuch an Inqueſt as can make it appear to the Court when the Debt is, or will be ſatisfied, and therefore ſuch Inquiſition is erroneous.

2. Inſt. 395. SECONDLY of the Moiety of the Lands and Tenements. And here we muſt remember what we have already ſaid, *viz.* that the Judgment did not bind the Goods till the Execution was laid upon them, becauſe it was neceſſary that a Man ſhould buy and ſell, and therefore would not alter Property till ſuch time as an Execution came down to the Sheriff, whereby

whereby he was authorized to alter the Property of the Goods, in order to levy the Debt, and then, and not before, the Goods were attendant to ſatisfy the Judgment.

THE Statute *Weſtm.* 2. *cap.* 18. does not alter the Law in this Caſe, becauſe it does not extend the Remedy as to the Chattels, ſince upon the *Fieri facias*, and the *Levari* as it ſtood at Common Law, the Sheriff might have ſold, and delivered over the Goods to the Creditor; but it gives Remedy as to Lands, and Tenements; and therefore the Words of this Statute are conſtrued to extend the Remedy as to the Land to the Time of the Judgment, for the Words are * *cum Debitum recuperatum, vel Curia Regis recognitum, vel Damna adjudicata, ſit de cætero in Electione illius*, which gives the Election immediately as ſoon as the Debt is recovered in the Court of the King, and therefore the Land is immediately bound from the Time of the Recovery of the Debt; but if the Election was made of the *Fieri facias*, they would not extend the Statute to bind from the Time of the Judgment, becauſe the Judgment did not bind the Chattels before; and there 13 Ed. chap. 18.

* *When a Debt is recovered, or acknowledged in the King's Court, or Damages adjudged, it is thence forward in his Election.*

is nothing appears in the Statute intending to alter the Common Law in this Particular, which had been before ſettled upon ſo good a Reaſon, and there was no Inconvenience that the Judgment in a private Caſe ſhould bind the Lands from the Time of the Judgment, as it did before in the King's Debts, ſince they might ſearch the Records of the King's Court for the one, as well as the other. By the old Books, the Lawyers would extend this Statute to the Time of the Writ purchaſed, and to the Time of the Inqueſt taken; but the Court would not allow this, becauſe it would be directly againſt the Words and Intention of the Statute, which ſays, * *cum Debitum fuerit recuperatum, ſit de cætero.*

26 E. 3. 15. 17.
27 E. 3. 7.
28 E. 3. 17.

THE Judgment binds not only the Lands and Tenements of which the Defendant is actually ſeized, but alſo the Reverſions on Leaſes for Lives as well as for Years; for though the Words of the *Elegit* are † *Medietatem omnium Terrarum, & Tenementorum præd. de quibus præd. Die Anno Regni noſtri primo, quo Die judic. præd. reddit.*

2 Rol. Abr. 473.
Dalton Sher. 126.
Savil, 34, 35.

* *When a Debt ſhall be recovered, it is thenceforward.*

† *That without delay you cauſe to be delivered a Moiety of all the Lands and Tenements aforeſaid, of which the aforeſaid B. was ſeized on the Day aforeſaid, in the firſt Year of our Reign, on which Day the aforeſaid Judgment was given, or ever afterwards.*

dit. fuit, vel unquam poſtea fuit ſeiſit. præfat. B. ſine Dilatione liberari facias; yet the Intent of the Writ extends to whatever Lands and Tenements were actually veſted in the Defendant; becauſe the Statute is **Medietat. Terræ*, which extends to Reverſions, which are compriſed under the name † *Terræ*, ſince they are Lands returning to the Defendant, when the particular Eſtate ceaſes, and therefore, though this was formerly diſputed, the latter Reſolutions have ſettled the Law to be as we have already mentioned; Rent-ſervices, Rent-charge, and Rent-ſeek, are within the Statute; for they iſſue out of the Lands, and therefore within the Word † *Terræ*; ſince the Rent is inſtead of the Land itſelf, and if this were not ſo, the Creditor might be cheated by turning Land into Rent.

Dy. 204. Dr. & Stud. 53.

7 Co. 33. Cro. Jac. 424, 477. Cro. Eliz. 656.

An Advowſon in groſs cannot be extended on an *Elegit*, becauſe a Moiety cannot be ſet out by the Sheriff, nor can it be valued at any certain Rent towards Payment of the Rent.

Advowſon in groſs not extendible.

Copyhold Lands are not extendible in the Hands of the Defendant, becauſe the Freehold Lands are in the Lord, and the Tenant is no more than a Tenant at will, according to the Cuſtom of the Manor;

Nor Copyhold, 3 Rep. 9. Savil. 66, 67. pl. 138. Rol. Abr. 888. Cro. Car. 44. Hardr. 433. O. Benl. 163. 6 Vin. Abr. 8.

* *A Moiety of the Land.* † *Land.*

169. pl. 4. Gilb. Ten. 185. 2. Inſt. 396. 3 Read. Stat. Law. 123.

Manor; and it would be unreaſonable, that the Lord ſhould have a new Tenant put upon him without his Conſent; and therefore, there being ſo apparent an Injury to the Lord, the Judges have conſtrued Copyhold Lands not to be within the Intent of the Statute, not being mentioned in the Words of it, but Crops of Corn, and the Profits of ſuch Lands, for * *Medietat. Terræ* refers to the Land of which the Defendant is Owner; but by the Statute for *Elegit*, the Lord was looked upon to be the entire Owner of thoſe Lands, and may be taken on an *Elegit*, for they are but Chattels belonging to the Tenant, and the Lord is noways injured.

Nor Glebe of Parſonage, Vicaridge, or Church Yard. Jenk. 207. pl. 36.

ELEGIT does not lie of the Glebe belonging to the Parſonage, or Vicaridge, nor to the Church-Yard, for theſe are each † *ſolum Deo conſecratum.*

Ancient Demeſne Lands extendible. Hob. 47. 48. 5 Co. 105. Mo. 211. pl. 351. 2 Inſt. 397. 2 Rol. Abr. 472.

LANDS in ancient Demeſne are extendible upon an *Elegit*, for there the Defendant has the Property of the Land himſelf, therefore within the Words of the Statute; and the Tenants in ancient Demeſne are to have the Title of their Lands tried in their own Courts, that they may not be obliged to leave their own Agriculture, and Plowing, and travel

* *A Moiety of Land.* † *Conſecrated ſolely to God.*

travel up to the ſuperior Courts; yet on this Execution, the Title of the Lands is not queſtioned, but the Judgment of the King's Court put in force; and in this Expoſition of the Statute, they have only followed the Common Law, by which Land in ancient Demeſne was liable to ſatisfy the Debt of the Anceſtor on a Judgment in the King's Court.

NOTE it has been formerly held, that an Aſſize of Land in ancient Demeſne, lay in the King's Court by force of the Statute of *Elegit*, but the latter Reſolution is, that ſuch an Aſſize doth not lie, becauſe they may have Remedy in the Court of the Manor, by Writ of Right of Cloſe, and Proteſtation to ſue it in the Nature of an Aſſize, and therefore they will not ouſt the Tenants of their ancient Privilege, ſince the Plaintiff has Remedy as well in the inferior, as in the ſuperior Court. 7 *H.* 4. 14. Fitzherb. Execution, pl. 118.

IF there be two Joint-tenants, and one acknowledges a Statute, and the Moiety is extended during the Life of the Conuſor, and the Debt is not ſatisfied during his Life, yet the Moiety ſhall remain in Extent after his Death, becauſe by the Extent, the Conuſee has a Term delivered to him till he is ſatisfied, whereby the Term is actually veſted in him, and the Jointure ſecured.

BUT

But if the Extent had not been executed during the Life of the Conuſor, then the Lands are diſcharged; for tho' the Moiety be bound by the Judgment, yet the **jus accreſcendi præfertur Oneribus*, becauſe the other Jointure comes in by the original Feoffment, and therefore no Charge of his Companion can affect him.

Co. Lit. 222. a 8 Co. 62. If a Man be diſſeiſed, againſt whom Judgment is recovered, the Lands in the Hands of the Diſſeiſor ſhall not be liable, for though the Diſſeizee has the Right of Poſſeſſion, yet they are not his till they be recovered.

Co. Lit. 222. So if a Feoffment be upon Condition, and the Feoffee acknowledge a Statute, and the Condition be broken, the Feoffor ſhall enter into the Lands freed of the Charge of the Statute, becauſe he comes in by a prior Title, and the Feoffee hath no Right to the Lands, not having performed the Condition upon which the Lands were given him; the Judgment binds the Moiety of the Land the Defendant has at any time after the Judgment; and therefore, if the Defendant aliens any Part of the Lands, the Plaintiff may extend the Moiety of the Lands remaining in the Hands of the Defendant, with-

* *Right of improving is preferred to Incumbrances.*

without going to the Lands in the Hands of the Alienee; becauſe he may take the Moiety of the Lands in the Eſtate. But after the Alienation, the Conuſor himſelf ſhall not have Contribution, becauſe 'tis his own Debt, which the Plaintiff has choſe to load the Lands remaining in his Hands; but if there are ſeveral Alienations, the Judgment equally binds them all, and therefore all muſt be equally contributory, and that Execution ought not to be laid upon one only.

If the Conuſee purchaſes Part of the Conuſor's Lands, this does not diſcharge the Statute againſt the Conuſor, but againſt the Feoffees of other Parcels it does; but if the Conuſee has Land delivered to him in Execution, and purchaſes Parcel of the Lands of the Conuſor, this diſcharges the whole Statute, becauſe where the Charge is actually on the whole Eſtate by the *Liberate*, it is a Charge of the whole Debt upon the whole Lands, and therefore purchaſing Part of the Lands ſubject to a Rent-charge, (for purchaſing being the Acts of the Parties) the Law has made no Proviſion for an Apportionment, and the whole Debt cannot lie upon the Reſidue, becauſe the purchaſed Lands were ſubject; but where the Judgment was only a Lien, he might purchaſe Part, and lay

lay the Debt on the Reſidue, as well if a third Perſon had purchaſed, he might lay the whole Debt upon the Lands remaining in the Hands of the Debtor.

But if the Execution be laid upon the Lands that did not belong to the Conuſor, or ſold before the Judgment, anciently the *Elegit* would have put him out of Poſſeſſion, and put him to his Aſſize, or Ejectment; becauſe being a Stranger both to the Judgment and Execution, he could not traverſe the Execution; but becauſe it was thought hard on ſuch Executions to turn Strangers out of Poſſeſſion, it is now the Uſe to give legal Poſſeſſion; and not actual Poſſeſſion, and ſo the Plaintiff who has Title by his *Elegit* ſhall bring his Ejectment.

But where the King extends for his Debt, there, upon Inquiſition, the Party is allowed to traverſe, becauſe the King cannot be a Diſſeiſor, or Wrong-doer, and therefore the Party cannot have an Aſſize, or Ejectment, if upon the *Liberate* he is put out of Poſſeſſion; and therefore for the Eaſe of the Subject, and that the King may do no wrong, the Party grieved is allowed to traverſe the Inquiſition; if a Man confeſſes a Judgment, or acknowledges a Recognizance, and enfeoffs ſeveral People of divers Parcels, there if the Conuſee

Conuſee extends the Land of one only, ſuch Feoffee is driven to his *Audita Querela*; for not being able to traverſe the Inquiſition, and it being an equal Execution, he muſt have Remedy, and the Remedy for any Injuſtice in an Execution not appearing on Record, is by *Audita Querela*; and if in ſuch Execution the Lands of the Conuſor only are omitted, the Feoffee may bring his *Audita Querela* againſt the Conuſee only; and if on ſuch *Audita Querela* he proves any Lands of the Conuſee omitted, it is an unjuſt Execution, and no Body being concerned in it but the Conuſee, who is to take Notice at his Peril of the Lands whereof the Conuſor had no Poſſeſſion, the Execution being illegal, ſhall be ſet aſide, and the Plaintiff on *Audita Querela* reſtored to the meſne Profits, and the Conuſee put to an *Elegit de novo*.

See *Audita Querela*, after.

But where the Lands of any Cofeoffee are omitted, there ſuch Perſon, whoſe Lands are extended, muſt bring his *Audita Querela* againſt the Conuſee, and ſuch Cofeoffee; for if he were to bring in the Conuſee only, and not the Cofeoffee to interplead, he might ſet aſide the Execution againſt the Conuſee, and yet when the *Elegit de novo* was brought, the Cofeoffee might ſhew Matter ſufficient

F. N. B. 104.

cient to excuſe his Land from the Execution, and then the Conuſee would be left remedileſs.

In this *Audita Querela* the Proceſs may be two fold, either *Fieri facias*, and ſo by Attachment and Diſtreſs infinite againſt the Conuſee, and Cofeoffee, or elſe by *Scire facias* againſt them; and if on ſuch *Scire facias* the Conuſee, and Cofeoffee do not appear, or on Appearance do not ſhew Matter in Diſcharge of thoſe Lands, at Common Law the Execution was ſet aſide, and the Plaintiff in *Audita Querela* was reſtored to the meſne Profits, the Conuſee put to bring a new *Elegit* of the Lands of ſuch Cofeoffee againſt whom Proceſs was extended, and this Extent iſſued without a *Scire facias*, though it was a Year and a Day after the Judgment; becauſe it appeared that there was no effectual Execution within the Year, which was ſet aſide, which was a ſufficient Authority for the Court to continue the Proceſs by an *Elegit de novo*, and there was no Reaſon to revive the Judgment, ſince when the Lands had all along continued without making Satisfaction to the Conuſee, there was no Preſumption that after the Year ſuch Lien was diſcharged.

In

In an *Audita Querela*, if the Cofeoffee comes in, he cannot plead that there are other Feoffees not named in the *Audita Querela*, for a Feoffee in the Execution is not to take notice of all the Land of the Conuſor whatſoever, but of that only which was ſufficient to diſcharge himſelf of the Injuſtice and Preſſure of that Execution, for the Execution is unjuſt not having Feoffees before the Court, and though there be many others, he ſhews enough, by bringing in one to get rid of the Execution which lay againſt him only, and if on an *Elegit de novo*, he can diſcover any other Feoffees, he is put to his *Audita Querela* to ſet aſide the ſecond *Elegit* by which he is oppreſſed. Dy. 331, 332. pl. 23.

But becauſe by the ſecret alienating by Conuſors and Perſons that had confeſſed Judgments, the Conuſees and Creditors were defeated of other Executions, therefore the Statute has provided, that if an Execution be laid on one Feoffee, he ſhall not defeat the Execution, but ſhall bring his *Audita Querela* againſt the other Feoffees to make them contributary, and a *Scire facias* grounded on the Statute againſt ſuch Cofeoffees, to ſhew Cauſe why they ſhould not contribute; and a Writ of Enquiry muſt iſſue to ſettle the Value of the Lands of the Plaintiff,

Plaintiff, and of the Defendant, and to proportion the Debt according to the Value of the Land, and an *Elegit de novo* will be awarded to extend the Land according to ſuch Value.

2 Vent. 104. BUT if a Judgment, on Recognizance has ſlept a Year and a Day, and *Scire facias* is brought againſt the Defendant, or Conuſor, or Tertenant, and they are returned warned, and ſome of the Tertenants come in, they cannot plead * *quod Breve caſſetur*, becauſe there are other Tenants unwarned, for that is no proper Plea in Abatement, ſince the Writ is general, to warn all the Tertenants, which Sir T. Jones 122. is as good a Writ as can be, and they cannot ſhew how the Plaintiff can have a better, and it is no Objection to the Writ, but to the Sheriff's Return in not Cro. Jac. 506. 507. doing his Duty thereon, ſo they are only to conclude to the Court, whether they, † *ad Breve in Formâ præd. return. reſpond. compelli debeant*; and therefore the Parole ſhall demur till ſuch Tenants are warned, and when they are warned, or *nihils* returned, they ſhall anſwer all together. Moor. 535. pl. 700. Very ver. Carew. But if there be a *Scire facias* againſt the Tertenants, and *J. N.* is returned warned, and he does not come in and plead, and Execution is taken againſt him only, he ſhall

* *That the Writ ought to be quaſhed.*

† *Should be compelled to anſwer the Writ returned in Form aforeſaid.*

ſhall have an *Audita Querela*, though on the *Scire facias* he might have pleaded, that there were other Tertenants that ought to have contributed; for though the general Rule is, that you ſhall never have an *Audita Querela* for what you could have pleaded to that *Scire facias*, yet this is to be underſtood where it is to bar the Execution, or to diſcharge the Defendant's Lands; and this Plea would not have ſhewn * *quare Executionem habere non debeat*, but only delay the Plaintiff till the others were brought in; and therefore, though the Judgment be not revived againſt him by the *Scire facias*, yet it ſtands revived to take out a good Execution: it is the Execution that hurts him, and not the Judgment; and for Injuſtice in an Execution after Judgment not appearing on Record the *Audita Querela* lies. But if there be ſeveral Feoffees, and one only is extended, and after ſuch Extent he aliens, the Alienee ſhall never be relieved by *Audita Querela*, becauſe he took the Land † *cum Onere*, *viz.* the whole Debt, and that ‡ *Onus* was conſidered in the Purchaſe; and the Right the firſt Feoffee had to a Contribution by an *Audita Querela* againſt the other Feoffees,

2 Bulſtr. 14. 15.

Danv. Abr. 640.

E was

* *Why he ſhould not have Execution.*
† *With the Incumbrance.* ‡ *Incumbrance.*

was a Choſe in Action, which could not be transferred in the Purchaſe: ſee more under *Audita Querela*.

Rol. Abr. 904. We come in the next Place to conſider, when the *Elegit* is a Bar to all other Executions; and here it is to be noted, that formerly they held, that the praying of an *Elegit* upon the Roll was ſuch a Bar, becauſe they looked upon that Writ as a Remedy, and if they once elected that Remedy, they thought that Remedy coming by the Statute inſtead of the *Fieri facias*, they could never afterwards make a new Election, and recur to the *Fieri facias*; and this continued even to my Lord *Coke*'s Time, who ſays, that the good Clerk never enters the *Elegit* on the Roll till he has the Effect of his Execution; for he thought, that though
Rol. Abr. 905. an ineffectual Remedy was choſen, yet it barred him of the other Writ; but they then held, that if there was a Judgment in *C. B.* and an Election on the Roll, that if it were removed by Error into the King's Bench, and there affirmed, he might have a new Election; becauſe it was a new Judgment of another Court where the Debt was recovered, and on that * *Debitum in Curia Regis recuperatum*, he had never made any Election before; but

* *Debt recovered in the King's Court.*

but afterwards, on a nearer Conſideration of the Statute, they came to a Reſolution, that it was not the Election of the *Elegit* on the Roll, but it was the Return of the Lands delivered by the Sheriff that was a Bar to the new Execution; and therefore, if *Nihil* was returned, that was no Bar, for this is plainly according to the Words of the Statute, * *Sit de cætero in Electione illius qui ſequitur pro hujuſmodi Debito aut Damnis ſequi Breve quod Vicecom. fieri faciat de Terris, & Catallis Debitoris, vel quod Vicecom. liberat ei omnia Bona & Catalla (exceptis Bobus & Afris Carrucæ) & Medietatem Terræ ſuæ quouſque, &c.*

So that by the Words of the Statute, the Election is not of the Writ, but that the Sheriff ſhould deliver; ſo that it is not the Choice of the Writ, that is a *Fieri facias*, but it is the Delivery of the Sheriff of the Lands in Execution, and if there be no ſuch Delivery, as there is none where the Sheriff returns *Nihil*, then there is no Bar to the *Fieri facias* by the Statute.

* *It ſhall for the future be in his Election who ſues for ſuch Debt or Damages, to have a Writ by which the Sheriff ſhall cauſe to be made of the Debtor's Lands and Chattels, or that the Sheriff deliver to him all the Debtor's Chattels, (except Oxen and Beaſts of the Plow) and a Moiety of his Land until, &c.*

Moor 341. pl. 462.

So if the Sheriff returns an Extent of the Goods, and *Nihil* as to the Lands, this is no Bar to a new Execution, becauſe the Words are, that the Sheriff ſhall deliver * *Bona & Catalla Debitoris & Medietatem Terræ ſuæ*; ſo that if he has not the † *Medietat. Terræ*, which is the new thing that was to be delivered on the *Elegit*, he has not the Delivery of what the Statute deſigned ſhould be the Bar to the *Fieri facias*; for the Delivery of the Goods is of the ſame Nature with the *Fieri facias*, and therefore was not deſigned to come in the Place of it; but if Lands are delivered, though of never ſo little Value, that will be a Bar, becauſe the Sheriff has delivered the Moiety according to the Statute. If the Sheriff returns, that he hath taken Inqueſt of the Land, but he could not deliver it to the Plaintiff becauſe it was already extended, this is no Bar to a new Execution, for the Sheriff does not deliver the Lands, which are the only Bar given by the Statute.

Rol. Abr. 905. Cro. Eliz. 160. Leon. 176.

Cro. Jac. 338.

If there be Judgment againſt two, and the Plaintiff has the Lands of one extended, and the Extent returned of Record, he cannot now have a *Capias*, or any Execu-

* *The Goods and Chattels of the Debtor, and a Moiety of his Lands.* † *A Moiety of Land.*

Execution againſt the other; becauſe he has Satisfaction according to the Statute, by the Sheriff's Delivery of the Lands, and he cannot have a *Fieri facias*, or *Capias*, which only ſupplies the Defect of the *Fieri facias*; and by the Delivery of the Land, he has it by his own Election in Satisfaction of the Debt.

If a Man has an *Elegit* for Lands which are ſerved, and the Sheriff delivers them to the Plaintiff, it was long doubted, whether he ſhould have an *Elegit* into another County, or for other Lands in the ſame County; the Reaſon of this Doubt was, that anciently they looked upon the *Elegit* as the Election of a Remedy, and therefore when it was once executed with Effect, they eſteemed him to have a Term in the Lands for Satisfaction of his Judgment, and therefore he could not afterwards ſue another Execution; but on better Conſideration of the Statute, they have allowed him to have an *Elegit* either in a new County, or in the ſame, for a Moiety of the Land in whatever County it lies, and if any Part in the ſame County hath eſcaped, yet according to the Statute, that ought to be delivered to the Plaintiff, and the Court is to give him a ſubſequent Authority ſo to do; ſo on a Suggeſtion that he has more Lands in the ſame County, they

Moor. 341. Cro. El. 160. 310. Rol. Abr. 304.

can extend Goods, becauſe by the *Elegit* the Sheriff is to deliver * *omnia Bona*, as well as the *Medietat. Terræ.*

Vent. 259. THE Sheriff within his County is to deliver Poſſeſſion by Metes and Bounds, and muſt deliver it of all the ſeveral Parcels that are within each Vill, and cannot deliver all the Lands of *Sale*, though they are of equal Value with the Lands of *Dale*, and if he does, it is a void Extent; becauſe he has not delivered the Moiety of the Lands in each Vill, ſo that the Inquiſition is void on the Face of it, and it may be quaſhed on Motion; and if the Plaintiff brings an Ejectment on it, it is no Title, for the Plaintiff cannot make Title on an Inquiſition that appears on the Face of it to be void; and ſo when the Lands lie within a Liberty, the Sheriff's Bailiffs muſt extend the Land, and deliver the Moiety within ſuch Franchiſe,

Cro. Car. 319. for the † *Vice-comes* is ſaid to deliver, when he does it by his Bailiffs.

A VOID *Elegit*, or a void Inquiſition is no Bar, becauſe the Sheriff has not effectually delivered the Chattels and Land according to the Statute, and the Plaintiff may have a new *Elegit* without a *Scire facias*, though it be after the Year; for it is no more than a Continuance of the former

* *All his Goods.* † *Sheriff.*

former Writ, which was awarded within a Year, and a void Inquiſition returned is, as if no Inquiſition had been returned, and then they may continue the ſame Writ. If an *Elegit* be awarded on the Roll till the Sheriff has returned *Nihil* on ſuch *Elegit*, the Plaintiff cannot reſort to another ſort of Execution; becauſe it doth not appear but that the Sheriff might have then delivered Lands in Satisfaction of the Judgment, and then the Plaintiff would have double Satisfaction.

WHEREVER Judgment is given in the King's Courts, it binds immediately a Moiety of the Lands, becauſe a Moiety by the Statute is to be attendant to ſatisfy ſuch Judgment; therefore if there be a Judgment of a ſubſequent Term only, a Moiety of the Moiety is bound; and therefore, if the firſt Judgment be extended, it extends a Moiety of the Whole, and the ſecond but a fourth Part; and therefore if the laſt Judgment, firſt extends the Moiety of the whole Land, as it may, the firſt Judgment ſhall extend from him the Half of what he has extended, which leaves him one-fourth, which was his Original here.

BUT if there be two Judgments of the ſame Term, they each bind a Moiety of the Defendant's Lands from the firſt Day Hardr. 23. 27.

of the Term, and therefore, each ſhall extend a Moiety, *viz.* both of them the Whole, for they have no Priority, and therefore it has been a common Way to take two ſeveral Bonds, each for the Moiety of the Money, that they may extend the whole Lands; but if there be ſeveral Judgments in the ſame Term, the ſecond Perſon that firſt extends the ſeveral Moieties, ſhall be firſt ſatisfied, all being equal as to the Date of their Liens: there is nothing in the laſt, that can vary the Date or the Extent that was laid on the two firſt; and the Statute of Frauds and Perjuries, that mentions that the Day when the Judgment was ſigned is to be entered, relates only to Purchaſers, * *bona fide*, that they may not be overreached by ſubſequent Judgments of the ſame Term in which they made their Purchaſe, which is a Fraud the Statute relieved againſt, and not to extend to Judgment-Creditors, who may take out immediate Execution if they pleaſe; and the Statute of 4 & 5 *Wil. and Mar. cap.* 2. for quieting Judgment Creditors, extends only to Judgments, and Mortgages, who ſearch ſuch Docquets for their Security, and not to Judgment-Creditors who may take out Execution immediatly.

29 Car. 2. c. 3.

* *Honeſtly.*

If a *Fieri facias* and *Elegit* be delivered to the Sheriff at the ſame time, with an Extent at a common Perſon's Suit, the *Fieri facias*, and *Elegit* ſhall take place, becauſe the Goods ſhall be attendant to ſatisfy in the firſt place the Judgment of the ſuperior Court. Bro. Abr. Tit. Judgment, p. 97.

If a Man takes out a *Capias*, and the Defendant dies in Cuſtody, the Plaintiff having by his Death loſt the Body, which is the Pledge for Satisfaction, he may have an *Elegit*, or any other Execution. This was long doubted, but is now ſettled by the Caſe of *Foſter* and *Jackſon*, in *Hobart* 52 to 62. *Cro. Jac.* 136, 143. *Rol. Abr.* 903. 21 Jac. c. 24. 2 Ld. Raym. 1451.

If the Sheriff extends the Lands, and the Plaintiff does not come to receive them, the Plaintiff muſt ſue a Writ *of Deliverance.* Bro. Abr. Tit. Judgm. 84.

Formerly, if a Man had an *Elegit*, and Lands were delivered, though thoſe Lands were evicted, he could have no new Extent, or any other Execution, becauſe the Sheriff had delivered to him the Lands of the Defendant in Satisfaction of his Debt according to his Election; and that by the Statute was to take place of other Executions, and therefore he took them at his Peril; for though he might have Execution during the Year, by ſeveral

veral *Elegits* in different Counties, or in the ſame County, yet after the Year, he could have no new *Elegit*, unleſs when the former was quaſhed; but if Lands had been evicted, and a *Scire facias* had been brought to have Execution, they would have pleaded the Acceptance of the Lands by the former Execution, but where there is an Execution; the Statute 32 *Hen.* 8. *Cap.* 5. has ouſted the Defendant of this Plea, and gives him a *Scire facias*, in which there muſt be forty Days between the *Teſte*, and Return to revive the Judgment, and to have a new Execution; but this muſt be, where all the Lands are evicted; for if Part only is evicted, or if the Whole be evicted but for a time, as by a prior Judgment, ſo that the Extent is ſtill continuing, there is no Remedy by this Statute.

THERE ſhall be no *Elegit* againſt an Heir till his full Age; and on a *Scire facias* brought againſt him, the Parol ſhall demur till his full Age; becauſe he may have a good Plea to bar the Execution which might be miſpleaded.

The CAPIAS.

Hiſt. and Practice of Common Pleas 10 to 20.

THERE is no *Capias* in Debt, or Damages at Common Law, but on Indictments on the Criminal's ſide *pro Delictis majoribus*,

majoribus, viz. capital Offences in the firſt Inſtance; for it is preſumed, that when a Man is in danger, he would fly from Juſtice; but in *Delictis minoribus*, that were not capital, as in Treſpaſs, *&c.* the *Capias* was the ſecond Proceſs; for they firſt attach him by his Goods, and if the Sheriff returned *Nihil* on the Attachment, then iſſues a *Capias*, that the Offence might not be unpuniſhed, nor the King loſe his Fine; but after Judgment, when a Fine was impoſed in Court upon the Defendant, a *Capias* iſſued immediately; becauſe the Perſon being in Court ought to pay down his Fine; and if he turned his Back on the King's Court, there was no *Fieri facias*, or *Nihil* returned upon it, but a *Capias* immediately; becauſe going out of Court without paying his Fine, it was preſumed he fled from Juſtice. But there was no *Capias* for the Debt, or Damage of a common Perſon, becauſe the Party having truſted him only with perſonal Things, his Remedy was only on the perſonal Eſtate, and the King had the Intereſt in the Body of his Subject; and the Lord in his *Feudatory*, or *Vaſſal*, to be called out to War, or to labour for him; and therefore none but the King could impriſon him.

THE firſt Alteration that was made in this Law, was by the Statute of *Malbridge cap.* 23; and by the firſt Statute it is provided, that if Bailiffs, who ought to render an Account to their Lord, withdraw themſelves, and have Lands and Tenements by which they might be diſtrained, then they ſhould be attached by their Bodies, ſo that the Sheriff in whoſe Bailiwick they were found, * *eos venire faciat ad Competum ſuum reddendum.*

2 Inſt. 143.
52 Hen. 3. c. 23.

THIS gave a double Remedy in the Action of Accounts, where the Sheriff on a Summons in Account, returned † *quod nihil habuit in Balliva ſua per quod ſummoneri potuit*; there a *Capias* iſſued as the next meſne Proceſs by virtue of the Statute, to make the Defendant appear.

SECONDLY, there lies by this Statute a ſpecial Original out of *Chancery*, which they called a *Monſtravit de Computo*; and this was on an Affidavit made in the *Chancery*, that the Defendant was his Bailiff, and owed him Money, and had ſubtracted himſelf; there the Party might take out this Writ, and in the firſt Inſtance attach the Body of the Defendant without any Summons; but if the Plaintiff took out a *Monſtravit de Computo*, when the Defendant

* *Is to cauſe them to be ſummoned to make up their Accounts.* † *That he had not any thing in his Bailiwick whereby he could be ſummoned.*

Defendant had Lands and Tenements, contrary to the Act, there was a ſpecial Writ in the Regiſter to relieve the Party, on taking out the Writ * *in Deceptione Curiæ contrà Form. Statuti*; and if he had Lands and Tenements, though they were not ſufficient, yet he might have Relief on ſuch Writ; but they muſt be Tenements, *viz.* Freeholds; for if they be Chattels, though never ſo conſiderable, the Writ is to be allowed.

By *Weſtm.* 2. *Cap.* 11. where there are many Servants, Bailiffs, or Chamberlains that ought to accompt, the Lord is to aſſign them Auditors, and if the Auditors found them in Arrear, that then they might arreſt the Bodies of ſuch Perſons, and put them in Goal till they ſatisfy the Lord of their Arrear; but if they aggrieved their Accomptants, and they could find Manucaptors, that would undertake to bail them before the Barons of the *Exchequer*, who ſhall find them Auditors, and in the Preſence of the Barons, or Auditors, they ſhall take the Account; and if they are in Arrears, they ſhall commit them to the Fleet. 13 Ed. c. 11. 2 Inſt. 378.

This is plainly giving the Lord a prerogative Power to aſſign Auditors to his Accomptants, which were not final, as the

* *In deceit of the Court againſt the Form of the Statute.*

the King's were; for the Crown does impartial Juſtice to all; but the Lord's Auditors, being aſſigned by himſelf, ought not to be final; and therefore if they placed to Account, what ought not to have been ſo placed, or did not make reaſonable Allowance, there was a Remedy before the Barons of the *Exchequer*, who were ſovereign Auditors of *England*.

THUS this Statute founded the Writ * *ex parte talis*, returnable before the Barons of the *Exchequer*, in order to force the Execution of this Statute; and the Party grieved found Security either in the *Chancery*, or before the Sheriff to appear in the *Exchequer*, and make up the Account; but if a Guardian in Soccage, 52 Hen. 3. c. 17. though he is within the Statute of *Marlbridge*, and ſo ſubject to a *Capias* in Account, yet the Pupil cannot aſſign him Auditors; for this Law of aſſigning Auditors was only intended for the Benefit of the Lords who were cheated by their Tenants and Servants that were in their Fealty, but not to a Guardian in Soccage, who is ‡ *in Loco Parentis* to his Ward.

BUT though the Statute provides, that the Lord ſhould aſſign Auditors to their Accomptants, yet till the Account is audited, they cannot arreſt the Parties; for the Lord's Auditors are of Record by this Statute,

* *On Behalf of ſuch a one.* ‡ *Inſtead of a Parent.*

Statute, which gives them Commiſſion to eſtabliſh ſuch an Audit; but ſince the Statute ſpeaks of Auditors in the plural Number, they muſt aſſign more than one, otherwiſe they are not within the Letter and Meaning of this Statute; and if the Lord be found Debtor in the Balance of the Account, he cannot be committed, nor the Bailiffs, and Receivers, but an Action of Debt may be founded on this Statute, and there the Lord cannot wage his Law, becauſe the Auditors are made Judges of Record by the Statute. If an Action of Account be brought in the County-court under 40*s.* though the Sheriff may hold Plea, yet he cannot aſſign Auditors; becauſe he is not authorized by the Statute to make ſuch Auditors Judges of Record in the County-court.

If the Auditors find the Receiver, they are to commit him to Goal by Warrant, reciting the whole Matter, and the Sheriff is bound to receive him.

But becauſe, pending the Account, he was not to be committed, there was great Likelihood the Receiver would run away, and not undertake the Account in this Method; therefore the Statute recites again, what had been enacted by the Statute of *Weſtminſter*, that ſo there might

Weſt. 2 Cap. 11. or 13 Ed. chap. 11. 2 Inſt. 378.

might be a competent Remedy, in caſe the prerogative Power given the Lord ſhould not prove effectual, and the Words are * " *Et ſi diffugerit, & gratis Com-* " *potum reddere noluerit, ſicut in aliis* " *Statutis alibi continetur, diſtringatur* " *ad veniendum coràm Juſticiariis, ad* " *Compotum reddend. ſi habet per quod* " *diſtringi poſſit*;" the Meaning of which is, that if he flies, there muſt be an Action of Account in the King's Court, and a *Diſtringas* to make him appear; for † *in aliis Statutis continetur*, is intend-
52 Hen. 3. c. 23. ed of the Statute of *Marlbridge*, *chap.* 23. and the Words ‡ *diſtringatur ad veniendum coram Juſticiariis*, muſt be intended, that he muſt bring his Action in the King's Courts, as the Words || *coram Juſticiariis* import.

THEN the Statute goes on, § *Et cum ad Curiam venerit, dentur ei Auditores Compoti coram quibus ſi fuerit in Arreragiis,*

* *If he ſhould fly, and refuſe to make up his Account willingly, as it is enacted in an other Statute, he ſhall be diſtrained to appear before the Juſtices, to make up his Account, if he has whereby he may be diſtrained.*

† *Enacted in another Statute.*

‡ *Diſtrain him to appear before the Juſtices.*

|| *Before the Juſtices.*

§ *And when he ſhall come into Court, Auditors of Account ſhall be aſſigned him, before whom if he ſhall be found in Arrears, and not able to pay them immediately, he ſhall be committed to Goal, there to be impriſoned in Form aforeſaid.*

ragiis, & ſtatim Arreragia ſolvere non poſſit, committatur Goalæ cuſtodiend in Formâ præd.; now this Clauſe preſently gives the *Capias* if he did not immediately pay the Arrears, after Judgment, without any Return to a *Fieri facias*, as it was in the Caſe of the King for his Fine.

NEXT come the Clauſes which award the Proceſs of Outlawries, * *Et ſi diffugerit, & teſtificatum fuerit per Vicecommit. quod non ſit inventus, exigatur de Comitatu in Comitatum quouſque utlagetur:* and this gives Outlawry both in Execution, and meſne Proceſs, but by the Word *diffugerit* when Judgment was pronounced, and he did not pay the Money, and after a *Capias* iſſued, and the Sheriff had returned † *non eſt inventus*, they proceeded to Outlawry, becauſe he fled from Juſtice, if he did not obey the Judgment of the Court, by which he was to pay the Money, or according to this Statute he was to ſtand committed, ſo that if he was not found on the firſt *Capias* he was ſuppoſed to be fled, but he was not conſtrued to have fled from meſne Proceſs, and ſo to be within the Words *et ſi diffugerit*, until it had appeared that he was not to be

* *And if he flies and it is certified by the Sheriff that he is not to be found, he ſhall be exacted from County to County till he is outlawed.*

† *That he was not found.*

found on the original *Capias, alias & pluries*; in Treſpaſs, before they proceeded to Outlawry, they did not conſtrue him to be fled in that Action, before all that Proceſs was ſpent; and therefore, to make the Law uniform, they did not conſtrue him to have fled till the like Proceſs was ſpent.

The next Clauſe is, * *Et ſit hujuſmodi incarceratus irreplegiabilis, & caveat ſibi Vice-comes, vel Cuſtos ejuſdem Goalæ, ſive ſit infra Libertatem ſive extra, quod per commune Breve quod dicitur replegiare vel alio Modo ſine Aſſenſu Domini ipſum a Priſonâ exire non permittat:* by this it is plain, that the outlawed Perſon is in the Execution irrepleviſable, and no Writ, *de Homine replegiando* lies; and the Sheriff is made liable by this Statute, as he was liable at Common Law if he had replevied Goods taken in Execution; and by the Statute it appears, that the Outlawry is a Judgment, which may be reverſed in the ſame Court, in order to make the Defendant irrepleviſable there, and every Court is Judge of the Error in their own Proceſs.

By

* *And ſuch Priſoner ſhall be without Bail, and the Sheriff ſhall take care, or the Keeper of the Goal, whether it be within or without Liberties, that he does not ſuffer him to go out of the Priſon, by a common Writ, which is called bailing him, or by any other Means, without the Lord's Aſſent.*

By this likewiſe it appears, that if the Sheriff lets him go, with the Aſſent *Domini ſui*, there is an End of the whole Execution, becauſe the Party can conſent by the Words of the Statute that he ſhall be diſcharged of the Execution, which diſcharges both the Pledge, and the Debt itſelf.

Then the Statute concludes, * *Quod ſi fecerit, & ſuper hoc convincatur, reſpondeat Domino de Damnis per hujuſmodi ſervientem ſibi illatis, ſecundum quod per Patriam verificare poterit, et habeat Dominus ſuum recuperare per Breve de Debito verſus Cuſtodem. Et ſi Cuſtos Goalæ non habeat per quod juſticietur, vel unde ſolvat, reſpondeat Superior ſuus qui Cuſtodiam hujuſmodi Goalæ ſibi commiſit per idem Breve.*

By which Words it is plain, that if a Man be in Execution, and be let to eſcape, the Plaintiff can never have a new *Capias*, becauſe the Debt is transferred upon the Goaler; but if it be on meſne Proceſs, the Plaintiff may have a new *Capias*, becauſe the Debt itſelf is not transferred on

* *Which if he ſhould do and be convicted thereof, he ſhall anſwer the Lord for the Damages thus incurred to him, in proportion as he is able to verify before a Jury, and the Lord ſhall recover by a Writ of Debt againſt the Keeper; and if the Keeper has not wherewithal to do Juſtice or to pay, his Superior ſhall anſwer, who intruſted him with the Cuſtody of the Gaol, by the ſame Writ.*

the Goaler, but he has an Action of Eſcape on the Equity of this Statute for his Damage.

THE ſeveral other Statutes that give the *Capias* in the ſeveral Actions are

25. Ed. 3. Cap. 17. gives *Capias* in Debt, *Detinue & Replevin* as it was in Account.

19. H. 7. Cap. 9. gives it in Actions on the Caſe.

23. H. 8. Cap. 14. gives it in Covenant.

23. H. 8. Cap. 15. } 4. Jac. 1. Cap. 3. } give *Capias* againſt the Plaintiff for Coſt if he be nonſuited, or a Verdict paſs againſt him.

8. & 9. W. 3. Cap. 11. A *Capias*, *Fieri facias*, and *Elegit*, againſt the Plaintiff on Demurrer for Coſt.

WE ſhall now ſpeak firſt of the CAPIAS.

SECONDLY of the OUTLAWRY.

THIRDLY of ESCAPE.

Firſt of the CAPIAS.

R. l. Abr. 897. Lutw. 1280.

IF a Man enter into a Recognizance in the *Chancery*, or *Common Pleas*, or into a Recognizance on a Writ of Error from the

the *King's Bench* to the *Exchequer* Chamber, no *Capias* will lie; the Reaſon is from the Tenor of the Recognizance, which is only to run by way of Execution on the Lands and Chattels, and the *Scire facias* revives the Obligation according to the Tenor of it; and though the Statute of 25 Ed. 3. gave a *Capias* in Debt, yet it did not give a new Execution on that Recognizance, and therefore, that Execution continues as it was at Common Law.

BUT in the *King's Bench*, a *Capias* lies, becauſe the Perſons there are ſuppoſed to be committed on ſome criminal Proſecution, and therefore when they are bailed out, the Undertaker is liable in the ſame Manner the Priſoner was, and therefore, ſince the *Capias* lies againſt the Priſoner, it lies likewiſe againſt the Perſon that undertakes to bail him.

ON a Recognizance taken by virtue of the Statute of 3 *Jac. Cap.* 8. [made perpetual by 3 *Car. c.* 4. *Sect.* 4.] on bringing Writs of Error, it ſeems no *Capias* lies though taken in the *King's Bench*, for this is not bailing a Priſoner in their own Court, but by virtue of the Statute which gives no *Capias*. Rol. Abr. 897. Moor. 274. Cro. Jac. 645.

THERE is no *Capias* given by the Statute for Damage in Dower, or Aſſize; and note the Statute in Account has Fitzherb. Tit. Ex. 164.

given it generally, *ſi diffugerit*, which is as well in meſne Proceſs, as after Judgment; and other Statutes having given it in the ſame Manner as it was in Account, ſo if there be a *Capias* in meſne Proceſs, there will alſo be one after Judgment.

If there be Judgment given againſt *A* and *B*, and *A* is taken on a *Capias*, and *Fieri facias* is executed againſt *B*, *A* is diſcharged, becauſe by executing the *Fieri facias* againſt *B*, the whole Debt, or ſome Part of it is actually levied; and then *A* cannot be in Execution in order to ſatisfy the entire Sum according to the Writ, becauſe he would be a Pledge to ſatisfy that which is no Debt at all, or at leaſt in Part no Debt, and therefore he muſt be diſcharged of that *Capias*.

But though *A* be taken in Execution, yet the Plaintiff may have Execution, by *Capias* againſt *B*, becauſe he may have a ſecond Pledge for that Sum which ſtill remains a Debt.

But if the Plaintiff takes out a *Fieri facias* againſt *A*, he may have a *Capias* againſt *B* for the Reſidue, becauſe though he has levied Part of the Sum, the Reſt remains a Debt, and for ſatisfying ſuch Reſidue, he may take the Body of *B* as a Pledge.

The

THE Plaintiff cannot have a *Fieri facias*, and a *Capias ad ſatisfaciendum* at the ſame Time againſt the Defendant, for the *Capias* is inſtead of the *Fieri facias*, and if the *Fieri facias* firſt iſſues, no *Capias* ought to iſſue, becauſe the Debt may be ſatisfied by the *Fieri facias*, and then he ought not to have a Pledge for Satisfaction beeauſe he has a Pledge in his Hands from whence he is to have Satisfaction, and therefore cannot ſue to have any other Satisfaction for that Judgment either by *Fieri facias* or *Elegit*.

BUT if the Defendant dies in Priſon, then in reviving the Judgment againſt the Heir or Executor, he may have an *Elegit*, or *Fieri facias*; for though he has loſt the Pledge of Satisfaction by the Act of God, it ſtill remains a Debt on Record, for which he ought to have Satisfaction.

IF the Plaintiff takes the Body of the Defendant in Execution, he ſhall never have Execution againſt the Bail, becauſe he has a Pledge for Satisfaction, and the Bail was to deliver the Pledge into the Hands of the Plaintiff which is already done.

So if on a *Scire facias* againſt the Bail, the Plaintiff recovers and has the Bail in Execution, he can never have Execution againſt the Principal, becauſe according

to the original Structure in the King's Bench of Bail, it was * *Corpus pro Corpore*; and therefore if the Body of the Bail was taken it was inſtead of the Body of the Defendant.

Cro. Jac. 549. BUT a Recovery in *Scire facias* is no Bar, becauſe he has not one Body for the other.

IF there be two Defendants taken in Execution, the Eſcape of the one, does not diſcharge the other, for each is no more than a Pledge; *vide poſtea.*

Latch. 187. ſee before 16. ON a *Capias ad ſatisfaciendum*, the Sheriff cannot receive the Money, as he can on a *Fieri facias*, for on the Command of the Writ, he is to take the Body, and bring it into Court, that the Plaintiff may be ſatisfied, ſo that the Money is to be paid into Court in order to diſcharge the Body of the Defendant, and not to the Sheriff below.

AND if the under Sheriff accepts a Mortgage in Satisfaction, and after the high Sheriff's Time is out, he receives ſuch Money, and the high Sheriff dies, no Action can be brought againſt the Executors of the high Sheriff for this Money: 1ſt. Becauſe an Action of Eſcape lies againſt the Sheriff † *ex Maleficio*, and not an Action ‡ *ex Contractu*, for receiving the Money. 2dly, The Money was not received

* *Body for Body.* † *For a Misfeaſance.* ‡ *On a Contract.*

received by the high Sheriff, but by the under Sheriff after the Sherriffalty was out, and the Relation ceaſed, and therefore it can by no means be conſtrued, that the high Sheriff aſſumed to pay it, and conſequently no Action lies againſt his Executors. N. B. that in the *Capias ad ſatisfaciendum* on which the Exigent is to be awarded, or the Bail to be charged, by *Lilly's practical Regiſter*, *p.* 560. *Edit.* 1735, there muſt be ſeven Days excluſive between the *Teſte* and Return, and it ought to be delivered four Days excluſive, (and none of them *Sundays*,) to the Sheriff; but I apprehend there muſt be fifteen Days between the *Teſte* and Return; ſee the Statute 13 *Car.* 2. *Stat.* 2. *c.* 2. *Sect.* 7.

Secondly of the OUTLAWRY.

THIS has been largely conſidered under *meſne Proceſs*; there is only to be added, that there can be no Outlawry in the *King's Bench* but upon Actions of Treſpaſs, and on Actions on the Caſe; becauſe the Outlawry muſt be an original Writ: for the Statute that gives it ſays, there muſt be a Return, * *quod nihil habet in Balliva mea per quod ſummoneri poteſt*, in Debt, or † *attachiari poteſt* in Treſpaſs, which is a Return upon the Writ,

* *That he hath nothing in my Baliwick, whereby he can be ſummoned.* † *Be attached.*

Writ, and the Statute of *Weſtm.* ſays, 13 Ed. * *et diſtringatur coram Juſticiariis*, which muſt be intended the Juſtices of the *Common Pleas*, and the Statute of 25 *Edw.* 3. *c.* 17. gives the Writ in Debt, *Detinue* and for taking of Goods, as in Account; ſo that the *Capias* in Outlawry came in by the Writ of Debt, which by the Statute 2 Inſt. 21. of *Magna Carta*, *cap.* 11. was returnable only into the *Common Pleas*; but in Caſe by the Statute 19 *Hen.* 7. *c.* 9. is given the *Capias* and Proceſs of Outlawry, and in Treſpaſs the Action of Treſpaſs, and Treſpaſs on the Caſe, being partly civil and partly criminal, was allowed in both Courts; for at Common Law it muſt be atteſted by the King's Bailiff † *quod nulla habuit Bona ſive Catalla per quod attachiari poſſit*; and therefore you could not outlaw on the Latitat, Bill of *Middx.* becauſe the *Capias* was the firſt Proceſs, and there was no Atteſtation by the Sheriff's Return that the Party fled from Rol. Abr. 806. Juſtice; ſo if an Attorney be nonſuited, and attached by his Body to anſwer the Coſts, no Proceſs of Outlawry lies, becauſe the Proceedings are not on an original Writ of the King, but by Attachment of Privilege only.

BUT

* *And be diſtrained before the Juſtices.*

† *That he had no Goods or Chattels by which he could be attached.*

BUT if a Writ of Error be brought from the *Common Pleas* to the *King's Bench*, and Judgment be affirmed thereon, a *Capias ad ſatisfaciendum* and Proceſs of Outlawry may be awarded; for the *Capias* is founded on a Judgment given on an original Writ of the King, and therefore * *ſi fugerit*, Proceſs of Outlawry lies by the Statute. 5 Co. 88.

UPON a *Capias utlegatum*, the Sheriff cannot ſell the Goods of the Defendant, by virtue of the Writ, for the Words of the Writ are † *et ea quæ per Inquiſitionem illam inveneris, in Manum noſtram capias & ſalvo cuſtodias, ita quod de vero Valore & Exitibus eorundem nobis reſpondeas*; which only gives the Sheriff Power to to take the Goods and detain them in his Hands, and not ſell them, and therefore if the Judgment or Outlawry be reverſed, he is reſtored to his Goods again; if there be two Conuſees of a Statute Staple, and they have the Defendant in Execution, and afterwards one of them is outlawed, whereby the Debt is forfeited to the King, the King may diſcharge him, becauſe the whole Debt for which Execution is ſo obtained, is forfeited by the Outlawry; the Sheriff may break the Defendant's Houſe Regiſt. Jud. 24. 5 Rep. 91. Cro. Eliz. 908.

* *If he flies.*

† *And ſuch as you ſhall find by that Inquiſition you ſhall take into our Hands, and keep them in Plea, ſo that you may anſwer us of the true Value and Profits thereof.*

4 Lev. 41. Houſe to ſerve the Writ, for he is out of the Protection of the Law, and therefore cannot receive that Protection and Safeguard which the Law gives People in their own Houſes.

On a *Capias utlegatum*, if the Defendant be in Execution, he ſhall not be diſcharged till he has paid the Debt, even without the Prayer of the Party; becauſe the *Capias utlegatum* is the Execution of the Judgment; the Outlawry being in order to take both the Party, his Lands and Goods, in ſatisfaction of that Judgment, and conſequently, cannot be diſcharged till the Judgment is ſatisfied; but if the Defendant be taken on the *Capias utlegatum* after the Year and Day, he ſhall not be in Execution for the Party without Prayer, becauſe the Judgment is preſumed to be ſatisfied, unleſs the contrary be ſhewn on the Suggeſtion of the Party.

If there be a Judgment, and a Fine to the King, and a *Capias* lie againſt the Party for the Damages, there if the King takes him for the Fine, it has been formerly held, that the Defendant was not in Execution without Prayer; becauſe the Party might have another Execution by *Fieri facias*, or *Elegit*; but the more modern Authorities are, that the Defen-

dant is in Execution without Prayer, becauſe the Courts are obliged * *ex Officio* to take Notice that the Party is ſatisfied when they iſſue a *Capias*; for the King's Fine is ſatisfied where they iſſue the *Capias* at the Suit of the Party; but where there can be no Execution by *Capias* for the Party, there the Defendant, though he is in Cuſtody for the King's Fine, cannot be in Execution for the Party without Prayer, becauſe the King could not have his Fine on a *Capias* at the Suit of the Party, therefore the Party cannot have his Debt on the *Capias* at the Suit of the King without Prayer.

But on Prayer, the King may ſo far indulge the Subject, as not to take a Fine, till the Subject is ſatisfied for ſuch a Damage for which the Fine was impoſed, as the King will not at the Prayer of the Party, take his Fine till the Defendant has ſatisfied his Damages, ſo if the Plaintiff have ſurceaſed his Time, that he could not have Execution immediately 5 Co. 88. either by *Capias ad ſatisfaciendum*, or *Fieri facias*, yet if the Defendant is in Execution for the King's Fine, the Plaintiff may pray him in Execution, for his Debt and Damages; for *primâ facie* the Court will preſume the Debt ſatisfied; yet when the contrary appears by the Prayer of the Plaintiff,

* *By their Office.*

Plaintiff, the Defendant ſhall be in Execution till he has ſatisfied the King, and the Party.

Of Escape.

Leon 73.
2 Leon. 96.
Hob. 60. 202.
14. H. 7. 1.

If a Man were in Execution by a a *Capias ad ſatisfaciendum*, this being an Execution of the Judgment, they formerly held, that if the Debtor eſcaped the only Remedy was againſt the Sheriff, and that they could have no new Execution, becauſe the Judgment was executed, and therefore could not be executed over again; and the Statute having given an Action of Debt for an Eſcape againſt the Goaler, or Sheriff, the Sheriff had transferred the Debt upon him, and therefore that was the only Remedy the Statute deſigned the Parties when an Eſcape happened.

But when the Debtor died in Execution, they held there was a Remedy by *Fieri facias*, or *Elegit*, and that it was not executing the Judgment over again, becauſe that the Body was only a Pledge for Satisfaction, and when the Pledge by the Act of God was gone, and the Debt remained, it was but reaſonable, that the Judgment ſhould be executed by *Elegit*, or *Fieri facias*, for otherwiſe the Debt that ſtill continued, could not receive any Satisfaction;

Satisfaction; from hence they found it neceſſary to come to another Reſolution, where the Debtor eſcaped, for that fortuitous Act of the Debtor, did not extinguiſh the Debt; and if the Debt had ſtill Continuance, it was unreaſonable not to allow the Creditor his Execution in order to have Satisfaction of his Debt; and it could not be properly ſaid that the Judgment was executed over again, when the firſt Execution was rendered by the Debtor himſelf ineffectual; and though the Statute of *Weſtminſter* gives a Remedy againſt the Sheriff, yet the Debtor was to be *irreplegiabilis*, and therefore it was more reaſonable to give the Creditor the Choice of his Remedy, than only to turn him over to an inſolvent Goaler for Satisfaction; and even before they came to this Reſolution, where the Goaler died, and the Debtor eſcaped, he was then in Cuſtody of the Law, and the Creditor might have taken him without new Proceſs, but where a Man eſcapes from a Goaler, or Sheriff, without the Conſent of the Plaintiff, the Creditor may have his Action againſt the Sheriff, whether the Eſcape be voluntary, or involuntary, otherwiſe the Statute would be eluded; and if the Plaintiff recovers againſt the Goaler, the Goaler has his Action over againſt

13 Ed.

3 Co. 52.

againſt the Debtor, or he may take him up, for he is ſtill his Priſoner.

But if the Goaler makes freſh Suit after the Priſoner, this is not an Eſcape, for he is not permitted to go at large when ſuch freſh Purſuit is made, nor is there any Negligence in the Sheriff, when on ſuch freſh Suit he takes him, *ſee p.* 87.

This is a penal Statute, and therefore does not go to Heirs or Executors, but is on the Sheriff or Goaler only.

See 2 Lev. 156. Sir Tho. Jones, 62. Saund. 38. 2 Inſt. 187, 382. Dy. 162. Cro. Jac. 658.

The Statute of 1. *Rich.* 2 *Cap.* 12. has declared what ſhall be an Eſcape, *viz.* to let the Party go out of Priſon by Baſton, or Mainprize; and though it mentions only the Warden of the *Fleet*, yet that is put but for an Example, for it extends to all Sheriffs and Goalers whatſoever.

In an Action of Debt on an Eſcape, it is neceſſary in the Declaration to ſet forth the Judgment, becauſe that is the Debt of Record which is transferred on the Goaler, and if that Judgment be reverſed, he may plead *Nihil* Record thereto; and though the Judgment be erroneous, yet the Sheriff cannot take Advantage of it, becauſe no Body can take Advantage of it but the Parties; and whilſt it is a Debt, and the Court has commanded it to be executed, the Sheriff cannot

cannot by any Act of his, make void ſuch Execution, for he is obliged to execute the Proceſs of the Court; but if there be a Recovery againſt the Sheriff, which is afterwards reverſed, the Sheriff ſhall have an *Audita Querela*, and ſo avoid the Execution upon it; for when the Judgment is reverſed, there was no Debt of the Defendant to be transferred upon the Sheriff, and therefore, the Judgment againſt the Sheriff is injurious.

SECONDLY, the ſecond Thing to be ſet out in this Action, is the Execution; and here if it be a void Execution, the Sheriff can take advantage of it by Demurrer, or on the general Iſſue; for if it be a void Execution, it gives no Authority to take him, and then there can be no Default in letting him go at large, and conſequently no Debt transferred from the Defendant to the Sheriff.

BUT to make it a void Execution, the Diſtinction is, where the Court has no Authority, nor Juriſdiction over the Cauſe; there the Judgment is void, and conſequently the Execution too, and gives no Authority to the Party to take up the Defendant, and retain him, and ſo no Eſcape to let him go. Yelv. 42. 2 Bulſt. 64, 65. 3 Mod. 325.

THUS, If any inferior Court, *viz.* the Court of *Kingſton upon Hull*, hold Plea Rol. Abr. 809.

on a Bond made at *Hallifax*, and give Judgment thereon, and award Execution, though the Sheriff lets the Defendant escape, he is not liable to an Action of Escape, because it is a void Judgment.

But if the Court has Authority over the Cause, and misawards Execution, or awards an Execution which does not lie, this is only an erroneous and not a void Execution; and therefore if the Sheriff lets the Defendant escape, an Action of Debt will lie against him.

Cro. Jac. 3. 280. 289 Mo. 274. Dy. 175. Poph. 203. Leon. 30. 8 Co. 141. b. 5. Co. 64. 2 Bulst. 64. 256. 2 Saund. 100. 101. 3 Mod. 325. Carth. 148. 5 Mod. 413. 12 Mod. 396. 2 Ld. Raym. 1530. Stra. 509. 2 Stra. 820, 1184.

But if the Party himself takes out an Execution, that will not lie, without an Award of the Court, such Execution will give no Authority to hold the Defendant, and therefore, there will be no Escape to let him go; if after a *Scire facias* on a Recognizance in *Chancery*, the Court awards a *Capias ad satisfaciendum*, and the Defendant is taken up, and the Sheriff lets him go, there it is an Escape, because the Court has awarded the *Capias*, though it be erroneous, and will not lie on such Recognizance, but such *Capias* will hold the Body in Execution till set aside by a Writ of Error.

Cro. Eliz. 188. Salk. 273.

But if the Party himself takes out such a *Capias*, there lies no Action against the Sheriff, because such Writ gives no Authority to detain the Body, because there

there is no Award of the Court, and it does not lie upon the Recognizance.

IF the Court awards a *Capias ad ſatisfaciendum*, after the Year and Day, and the Sheriff lets the Defendant eſcape, he is liable; but if a Man take out a *Capias* * *ad reſpondendum in Trinity*, returnable in *Hilary* Term, this is a void *Capias*, becauſe it is returnable after a Term, and ſo might be made with a Return ſo long, that would deſtroy the Liberty of the Subject. Salk. 273. 2 Salk. 700. 7 Mod. 29. 2 Ld. Raym. 775.

THE Giſt of the Action is † *permiſit ire ad largum*, without Gree made to the Parties, for if Gree be made with the Party, it is a total diſcharge of the Execution; becauſe he was taken in order to ſatisfy; if the Priſoner be left at large by the Keeper, though it be by Bail, Mainprize, or Baſton, it is an Eſcape; for he is to be ‡ *in arctâ Cuſtodiâ*, in order to compel him to Payment, and the Goaler cannot diſpoſe of any Pledge in any Manner, but according as the Law has directed, which is, that he is to be in cloſe Cuſtody, and if he were otherwiſe, the Priſoners would only be Contributors to the Goals, and the Statute of *Rich. 2d.* is only declaratory of what was the former Rol. Abr. 806.

* *To anſwer.* † *That he ſuffered him to go at large.* ‡ *In cloſe Cuſtody.*

mer Law, and though it mentions only the Wardens of the *Fleet*, yet being declaratory of the former Law, it extends to all other Sheriffs and Goalers. The

Dalt. 561. Dy. 166. King by his Writ of *Habeas Corpus*, may command the Priſoner out of the Goal, becauſe the *Habeas Corpus* is the King's Writ of Liberty, whereby he is to ſee whether the Party be legally impriſoned, as likewiſe to ſerve any Purpoſe, as to teſtify, *&c.* but is ſtill ſubject to the Execution; and when the Purpoſes in the Writ are executed, he muſt be remanded; and if the Goaler abuſes the Writ to any other Purpoſe than according to the Writ, it is an Eſcape, becauſe where the Writ does not give him Authority, he permits him to go at large, and lets him wander to other Places, it is an Eſcape, ſo if the Sheriff lets him go into any other County, not in his way to the Court, it is an Eſcape.

Mod. 116. 3 Keb. 306. pl. 47.

The PLEAS to this ACTION.

Dalt. 562. THE general Iſſue in this Action, is * *nihil debet*, and formerly they held freſh Purſuit could not be given in Evidence on this Iſſue, becauſe it is an Excuſe which ought to be exhibited to the Court with all its Circumſtances, to ſee whether pleaded;

* *That he owes nothing.*

it will excuſe, and no doubt it may be pleaded; becauſe it is an Excuſe to the Defendant, ſince by his retaking him recently, he ſhews there was no Permiſſion for him to go at large; but now they allow it to be given in Evidence upon the general Iſſue, becauſe it is to the Giſt of the Action, and ſhews, that there was no Permiſſion to go at large, and therefore by the Freſhneſs of the Purſuit, he is, as it were ſtill a Priſoner, and though he be out of his Sight, yet if he be retaken on the freſh Purſuit, Rol. Abr. 808. it is well enough; but freſh Purſuit muſt be made, and the Defendant taken, before the Action is brought, becauſe the Plaintiff had Cauſe of Action at the Commencement of the Suit, and there was a Time in which there was no Suit; ſo if the Defendant eſcapes, and freſh Suit is made after him, and he dies before he is Poph. 186. retaken, an Action will lie, and the freſh Suit is no Excuſe unleſs he be retaken, for he died at large out of Goal.

Note, the freſh Suit is allowed a good Dalt. 562. Plea, where the Eſcape is not a negligent Cro. Jac. 657, 658. and voluntary Eſcape; yet it is no Plea to Hob. 202. Latch 201. & a voluntary Eſcape, that the Priſoner is Noy. 93. cont. diſcharged of the Execution, and cannot be retaken, or if he be retaken, he cannot be held on the Recaption, and there-

fore if the Plaintiff charges a voluntary Eſcape, it is no good Plea to ſay that the Priſoner made a negligent Eſcape, and that he took him, unleſs he traverſe the voluntary Eſcape, for he neither confeſſes, and avoids, or traverſes the Giſt of the Action; for he confeſſes and avoids a negligent Eſcape, yet that is not the whole Giſt of the Action, for the Plea would not be good if it was a voluntary Eſcape, and this Plea not going to the whole Charge of the Action, he muſt traverſe the Reſidue, *viz.* the Voluntarineſs of the Eſcape to make it a ſufficient Bar.

THE general way of declaring is * *quod permiſit ire ad largum*, without voluntary, becauſe if it is laid voluntary, and the Defendant pleads the general Iſſue, it will be neceſſary to prove the Goaler made the Priſoner free, otherwiſe he will not prove his Declaration as he has laid it, for voluntary is not mere matter of Aggravation, but is a different Sort of Eſcape; on the * *permiſit ire ad largum*, it is ſufficient to plead, that the Eſcape was † *contra Voluntatem*, and that he made freſh Purſuit after him.

3 Co. 71. IF the old Sheriff hath Priſoners, and doth not deliver them over to the new Sheriff

* *That he ſuffered him to go at large.* † *Againſt his Will.*

Sheriff according to the Directions of the King's Writ, then if the new Sheriff hath not the Cuſtody of them, it is no Eſcape in the new Sheriff if they go at large without ſatisfying of the Debt, which is not charged upon them in the Indenture; but an Action of Eſcape will lie againſt the old Sheriff, becauſe he has the Cuſtody of him by the Writ till he has diſcharged himſelf of them, by delivering of them over by Indenture to the Sheriff according to the King's Writ, and the Sheriff is not obliged to take notice of the Record of the Executions, by which ſuch Priſoners came into Cuſtody, becauſe his Cuſtody does not commence by the Record of the Execution, but by the Delivery of the old Sheriff by Indenture, as we have already ſaid; but where the Marſhal, who has the Office in Fee, lets a Priſoner eſcape by Agreement, and the Priſoner comes back to Goal, and the Marſhal dies, the Heir is liable on the ſecond Eſcape; becauſe the ſame Office is continued on the Heir, and therefore he has the lawful Cuſtody of the Goal at the Time of the Death of his Anceſtor, and therefore if he lets the Priſoner eſcape, he is liable; if the Goal be broke by the King's Enemies, or burnt by Lightning, and the Priſoners go out,

Hob. 202.

2 Lev. 189.

Rol. Abr. 808.

this is no Eſcape, becauſe theſe are inevitable Accidents.

But if Traytors, Thieves, Rebels break the Goal, this is an Eſcape, becauſe the *Poſſe Comitatus* are ſuppoſed in Law ſufficient to reſiſt them.

If the Treaſurer and Barons of the *Exchequer* ſuffer a Perſon to go out that is a Debtor to the King, this is an Eſcape, becauſe they have no Authority to diſcharge the Execution without the Gree of
13 Ed. the Party, by the very Words of *Weſtm.* 2. nor by a Writ * *de Homine replegiando* by the Words of the ſame Statute.

But he may be brought up, as it is ſaid by *Habeas Corpus*, becauſe that Writ is of equal Authority with the *Capias*, by which he is impriſoned, and he is not within the Words, and Intention of the Statute; for they did not deſign to take away from the King the Power of inſpecting the Legality of the Commitment of any Subject; beſides, by the *Habeas Corpus*, he comes up a Priſoner, and therefore that is no Diſcharge of the Execution, and does not let him go to Bail or Mainprize, as he was in the Writ of * *Homine replegiando.*

If the inferior Officer be not reſponſible, the ſuperior by the Statute is to anſwer it, as the Earl Marſhal is anſwerable

* *To replevy a Man.*

able for the Goaler of the Marſhalſea, and he that has the Wardenſhip of the *Fleet* in Fee, is anſwerable for his Leſſee for Life, or Term for Years; and the Lord Mayor, and City of *London*, who have the Superintendancy of the Priſoners in the City, are anſwerable for the Eſcape of the Sheriff, in caſe of their Inability; and this is upon the Words of the Statute, that if the Inferior cannot anſwer, * *reſpondeat ſuperior*; but this is for the immediate Degree, becauſe no further Remedy is given by the Statute.

If there be Judgment againſt two, and one eſcapes, though the other is in Priſon, yet the Sheriff is liable for the whole Debt; becauſe each Body is a different Pledge for the whole Debt, and therefore, if either of them eſcapes, that Debt is transferred on the Sheriff. Rol. Abr. 810. Dalt. 561.

If there be a Recovery in Eſcape againſt the Goaler, and the Judgment on which the Action is founded be reverſed, the Goaler cannot aſſign this as an Eſcape, but ſhall have an *Audita Querela*; which ſee in Tit. *Error*. Cro. Jac. 646.

An Action of Debt will not lie for an Eſcape on meſne Proceſs, becauſe not given by the Statute; nor is the Debt aſcertained till Judgment, and therefore, could not be transferred on the Officer for letting Action of Debt will not lie for an Eſcape on meſne Proceſs.

* *The ſuperior ſhall anſwer.*

letting the Priſoner Eſcape. But an Action on the Caſe will lie againſt the Officer for ſuch an Eſcape, becauſe to ſuffer ſuch an Eſcape is a Failure of Duty in the miniſterial Officer, and for ſuch Failure in a miniſterial Officer, an Action on the Caſe lies; and the Plaintiff, in order to intitle himſelf to Damages againſt him, muſt ſet forth the Cauſe of the Action, the Court of Juſtice from whence Proceſs is taken, the legal Proceſs iſſuing from thence, and the Delivery of ſuch Proceſs to the Officer, the Arreſt by Authority of ſuch Proceſs made, by the Defendant's letting the Priſoner go at large, the Plaintiff's not being ſatisfied, and to entitle him to Damages, that the Priſoner is ſtill at large.

Mod. 227. 245. Rol. Abr. 807. Cro. El. 852. 624.

THE Sheriff is obliged to take Bail, by the Statute 23 *Hen.* 6. *c.* 10, and therefore, the leting him to Bail is no Eſcape, though the Bail is inſufficient; but he is amerciable till he brings in the Body; but if he does not let to Bail, but ſuffers an Eſcape, he is amerciable till he returns the Writ, or an Action lies againſt him, and the Sheriff may plead the ſame Statute.

Rol. Abr. 807. Cro. Jac. 419. 3 Lev. 46. 2 Rol. Abr. 456, 457. Dal. Sher. 216, 217.

To this Action he may likewiſe plead a Reſcous, or may return it by the Writ, for he is not obliged to bring the *Poſſe Comitatus* where the Defendant is not ſuppoſed

poſed to fly from Juſtice, and where the Pledge in *Decenna* was anciently anſwerable for his forth-coming; but in an Action on Eſcape againſt a Priſoner in Execution, this is no Plea, for he was there obliged to ſecure at his own Peril, a Man who had withdrawn himſelf from the Judgment of the Court. Sir W. Jones 202. 6 Mod. 141. Dy. 212. 241.

If the Serjeant of Mace of the Compter arreſt one, and lets him eſcape before he puts him into Goal, the Sheriff is not liable, becauſe the Sheriff is Judge of the Court, and the Serjeants miniſterial Officers; but if he is in Priſon, the Sheriff is liable, becauſe he is Guardian of the Priſon; but if Proceſs had iſſued out of the King's Court he is liable, becauſe he is the Miniſter to the Proceſs. Hiſt. and Pract. of Common Pleas 20, 22. Rol. Abr. 806. Dalt. 560.

By 1 *Ann Stat.* 2. *chap.* 6. *Sect.* 1. if a Priſoner eſcapes from the *Fleet*, or *Marſhalſea*, on Oath made before a Judge, the Plaintiff ſhall have a Warrant to ſeize him, and carry him to the County-goal. Wil. Rep. 439.

As to *Habere facias Poſſeſſionem, & Seiſinam*, ſee Tit. *Ejectment*, the Caſe of *Moone* and *Savile*.

Scire Facias.

We ſhall now treat of ſuch *Scire facias*, as is to revive Judgments againſt Bail.

And

2 Inſt. 471. AND here we muſt note, that whereever the Parties to the Judgment were charged, or a Year and a Day had paſſed, there no Execution could be taken out without a *Scire facias*, becauſe there was a Preſumption in Law, that ſuch Judgment might be diſcharged, or ſome Compenſation made by Agreement inſtead of it; and therefore, the Parties had a Day in Court to anſwer thereunto; but this was originally only in real Actions, for in perſonal Actions, they were obliged to begin their Actions *de novo*, becauſe the Preſumption was exceeding ſtrong, that the Judgment was ſatisfied, and therefore after the Year and a Day, it only continued a Debt, but it was not conſidered as Judgment for Execution; but the Statute of *Weſtm.* 2. *cap.* 45. gives a *Scire facias* in the perſonal Action, as well as the real.

13 Ed. 2 Inſt. 469.

2 Inſt. 378. THERE is another Reaſon for the Law, becauſe after the Year and a Day, the Plaintiff and Defendant were brought out of Court, for the Defendant is out of Court by the Judgment; for the Warrant of Attorney is * *quouſque Placitum terminatur*, and the Defendant's † *Placitum* is determined by the Judgment; but as to the Plaintiff he remains in Court a Year and

* *Until the Plea be determined.* † *Plea.*

and a Day, ſo that he may within that Time acknowledge Satisfaction, for a Year and a Day was thought a competent Time to get Execution of the Judgment, as it was for all Parties to claim upon the Recoveror, in the Writ of Right after the final Judgment, and ſo long as the Plaintiff was in Court by Attorney, either to receive the Money, and acknowledge Satisfaction upon Record, or to take out Proceſs in order to get it, it is true the Plaintiff may at any time acknowledge Satisfaction on Record, and make his Attorney for that purpoſe; but if he call the Defendant in to make Satisfaction after the Year, he was obliged to have Proceſs of *Scire facias*; becauſe the Defendant might have paid it to the Attorney before the Year and a Day was out; but after the Year and a Day, they are both out of Court, for then the **Placitum* was determined both as to the Plaintiff and Defendant, for they reckon the Year and the Day to be † *Finis Litium*, begun and moved in any Court whatſoever, and as at firſt, their Judgment was given the ſame Day the Parties were brought in, ſo there was but a Year and a Day for the Execution of it, and ſo long the Pledges were obliged to bring in the Party, and ſo long the Plaintiff's Attorney

* *Plea.* † *The End of Suits.*

ney remained, and this was the Time for any Perſon that had a Claim in the ſame Thing to bring it in, and therefore, after that Time, all Proceedings were ſaid to be aſleep till they gave a new Day to each other.

Leges Lombardi, Lib. 2. Tit. 43.

THE Year and the Day was the ancient Term in old Times, for the Tenant to demand the Inveſtiture, and to do Fealty in the Lord's Court, and if it was not done within the Year, it was loſt; ſo that this ſeems to be the general Time by which Latches were to be computed in the old Law, and ſo this was the Time in which the Acts of the Court had Force, and by Conſequence, the Warrant of Attorney went no farther then when the * *Placitum terminatur*, and this was the ancient Term in all the judicial Acts.

2 Leon. 77. 78.

BUT though there was a Year and a Day to execute the Judgment, yet if there was Execution taken out, and that was continued beyond the Year, there was no Occaſion for a *Scire facias*, for then at Common Law there was a Preſumption, that the Judgment was ſatisfied, becauſe there appeared an Execution taken out, and it was the Default of the Miniſter, that the Writ was not ſerved.

BUT

* *Plea is determined.*

BUT if the Plaintiff in the Judgment, die within the Year and Day, the Executor cannot ſue an Execution without a *Scire facias*, becauſe they are not Parties to the Judgment, and it is only the Probat of the Will that makes them ſo. weſt. 2. or 13 Ed. 2 Inſt. 471. 14 Hen. 7. 16. Co. 45.

BUT if an Execution were ſued out in the Life-time of the Teſtator, the Sheriff may execute it after the Deceaſe of the Party, becauſe it is an Authority from the Court, and not from the Party.

WHEN the *Scire facias* is taken out, and the Sheriff return *Scire feci*, if the Party does not appear according to the Warning made by the Sheriff, there is a Judgment againſt him, for there being Judgment given againſt him, and he being warned, ſhews no Cauſe why it ſhould not be executed, and therefore Execution muſt go againſt him.

BUT if on a *Scire facias*, the Sheriff returns *Nihil*, a ſecond *Scire facias* muſt iſſue, becauſe where the Party did not appear, there was no Judgment at Common Law upon the firſt Warning, as in the Writ of Right there is not only the Summons on the Writ, but likewiſe a *Grand Cape*, which was a ſecond Summons before they had final Judgment, and therefore a *Scire facias* they formed upon the ſame Model, that there ſhould be

be two Warnings before it ſhould be a compleat Warning for Judgment.

Cro. El. 472. IN the *King's-Bench*, where they proceed by Bill, there was ſeven Days between the *Teſte* and Return of the Writ, and therefore they could have two *Scire facias* returned in the County, and get Judgment as ſoon as he could have one *Scire facias* in the *Common Pleas*, where there was fifteen Days between the *Teſte* and Return.

HENCE they drop'd one *Scire facias* on Judgment in *C. B.* where the ſame Party to the Judgment was warned, becauſe being Party to the Judgment, he ought himſelf to take notice of it, and on this Conſtruction they ſuperceded the Neceſſity of two *Scire facias* in *C. B.* but in all other Caſes, where any other Perſon is brought, that was Party to the Judgment, as the Heir, Executor, and Bail, there muſt be then two *Scire facias*, as there are always in the *King's-Bench*, as well againſt the Party himſelf, as againſt the Heir, Executor or Bail.

THE *Scire facias* muſt be brought in the County where the Action was laid, becauſe the Defendant is ſuppoſed to reſide in the County where the Action is brought againſt him; for the Proceſs is ſuppoſed to go out in order to bring him in

in to appear, and therefore, there he muſt be warned to ſee if the Judgment was ſatisfied.

BUT if an Action was brought on the Judgment, it muſt be commenced in *Middleſex*, becauſe the *Placita* of the Court is * *apud Weſtmonaſterium*, which makes it a local Action, ſince the Record appears to be confined to that Place by the *Placita*, and the Debt ariſing upon the Judgment, it muſt be laid to be where the Judgment was given. Hob. 196.

BUT upon a Recognizance, they may bring the *Scire facias* either in the County where it was acknowledged, or in the County were the Court ſits, becauſe it is continued into two Counties; for the Inception is in the County where it was taken, and the Perfection where it was recorded; and it appearing in the Record itſelf, that it had a Beginning in one County, and a Perfection in another, they may bring the *Scire facias* in which they pleaſe, for it has equal Relation to both Counties. 2 Lut. 1287. Hob. 196.

A *Capias ad ſatisfaciendum* againſt the Principal, muſt be returned before a *Scire facias* againſt the Bail, becauſe the Court having delivered the Perſon that was their Priſoner out upon Bail, they muſt Lev. 225. 2 Lut. 1287.

* *At Weſtminſter.*

ſend for him in again, before they permit the Bail to be vexed, ſince he is lawfully in the Cuſtody of the Bail, till they redemand him. If the Defendant be taken upon the *Capias ad ſatisfaciendum*, though he afterwards eſcapes, the Bail are diſcharged, becauſe he was taken out of the Cuſtody of the Bail, and into the Cuſtody of the Officers of the Court by the Authority of the Writ.

2 Lut. 1273. Cr. Car. 481.

2 Lutw. 1287.

If the *Capias ad ſatisfaciendum* be returned * *non eſt inventus*, though it be not filed, the Plaintiff may bring his *Scire facias*, becauſe the Party has called for him in, and if he does not come in upon that Call at the Return of the Writ, which was ſufficient to ground a *Scire facias*, whether the Return was filed or not, and the Court can at any time file ſuch Return, and then it will appear the Party did not come in when called for. If the Bail bring in the Defendant before the Return of the *Scire facias*, or before the Return of the ſecond *Scire facias* where *Nihil* is returned to the firſt, there he is diſcharged; becauſe the Bail, on the Warning of the Court, brings in his Priſoner whom he has undertaken to keep; ſo if an Action of Debt be brought upon the Recognizance, if he bring him in within

* *Not found.*

within eight Days after the Return of the *Latitat*, the Bail is discharged; for the same Time is given upon the second *Scire facias*, and they give them the longest Time on such *Latitat*, because the Bail is not regularly called upon by the *Scire facias*; see Mr. *Clark*'s Rules of the *King's-Bench*.

IF the Judgment be removed by Writ of Error; either within the Year and the Day, or after, and the Judgment be affirmed, and the Writ of Error be discontinued, or the Plaintiff in Error be nonsuited; this will revive the Judgment; for affirming the Judgment, is a new Judgment, and by bringing a Writ of Error the Defendant is in Court, and the Plaintiff may be also there if he pleases; whereas after the Year and a Day, they are out of Court, and cannot come into Court in an adversary Way without Writ. 2 Inst. 471. Rol. Abr. 899.

BUT if the Principal and Bail join in a Writ of Error, this does not remove the Record, nor give a Day in the superior Court, and therefore does not revive the Proceedings, but the Party in order to have Execution must have a *Scire facias*; if the Plaintiff brings a *Scire facias* within the Year, he cannot have Execution even within the Year, till he has obtained a new Judgment upon the *Scire* Rol. Abr. 899. Cro. Car. 481. Rol. Abr. 900.

facias, for he has given the Defendant a Day in Court to ſhew Cauſe againſt ſuch Judgment; and therefore he cannot have Execution while ſuch Cauſe is depending.

Rol. Abr. 899. 2 Inſt. 471. THE Year and the Day of the Recognizance, is to be computed from the Time ſuch Recognizance is in Force, and and not from the Day of the Acknowledgment; for the Condition ſuſpends the Force, and the Plaintiff could not take out Execution till the Suſpenſion was taken off, and there is no Latches to be imputed to the Plaintiff, till there has been a Year and a Day open to the Execution.

2 Inſt. 472. *Note*, There is no Action for a *Scire facias*, as on the Charge of the Party in a Statute-Staple, or Statute-Merchant; for that is otherwiſe provided for by the Statutes which warrant thoſe Judgments.

2 Inſt. 471. THE laſt Thing we are to take notice of upon this Head is, what diſcharges an Execution. This may be done ſeveral ways, as by purchaſing part of the Lands ſubject to the Execution, *which ſee before*; or the Perſon of the Defendant may be diſcharged by the Plaintiff's conſenting to the Defendant's Eſcape, of which *ſee* Tit. *Eſcape*; ſo that what we ſhall treat of now, is how far the Plaintiff's Releaſe ſhall operate to diſcharge the Execution.

AUDITA

AUDITA QUERELA.

THE *Audita Querela*, is a Writ to be relieved againſt an unjuſt Execution, and differs from the Writ of Error, and Attaint, for that the Writ of Error relieves againſt the Miſtake of the Judges, (for Injuſtice cannot be ſuppoſed on their Part, as ſitting under the King's Commiſſion and Authority.) * Attaint corects the falſe and perverſe Verdict in the Jurors, and thereby ſets aſide the Judgment as being founded on a falſe Verdict. F. N. w. N. B. 233.

BUT the *Audita Querela* ſets aſide the Judgment for ſome Injuſtice in the Party that obtained it, which could not be pleaded in Bar, for if it could, then it was the Party's own Latches not to plead it in Bar of ſuch Demand, which is not relieved by this Writ, that Proceedings may not be endleſs. The Injuſtice in the Party againſt which this Writ relieves, is firſt, by Deceit; as if the Party be not repreſented by an Attorney, by him conſtituted, and here this Writ is in this Particular only co-incident with the Writ of Deceit; but the two Writs do not conſider the ſame Matter † *ſub eâdem Ratione*, for the Writ of Deceit firſt conſiders

* *The modern Motions for new Trials have rendered this Remedy obſolete.* † *On the ſame Reaſon.*

ſiders the Deceit to puniſh it by giving Damages, and ſets aſide the Judgment, reſtoring the Property to the Perſon againſt whom ſuch Judgment was obtained, by the Party to the Deceit; but the *Audita Querela* in the firſt Place complains of the Injuſtice of the Execution, in order to have Reſtitution, and puniſhes the Deceit only by way of Conſequence.

Note, when the *Audita Querela* complains of a Deceit, precedent to the Judgment it is to be ſet aſide, if the Complaint be found true, there it is a Writ of Deceit; though the formal Words of an *Audita Querela* be made uſe of in the Writ. *See* an Inſtance of this hereafter.

9 H. 5. 2. Fitz. *Aud. Quer.* 13, B. 16.

SECONDLY, if the Plaintiff releaſes after the Days in Bank, or after Judgment, then the Defendant ſhall have an *Audita Querela*; for though the Releaſe doth not annul the Judgment, as being not a Matter of equal Notoriety, yet it precludes the Execution; ſince the Plaintiff cannot take out Execution contrary to his own Act, which hath diſcharged the Benefit of ſuch Judgment.

THIRDLY, it lies where the Party takes out an unjuſt Execution on a lawful Judgment; as when it loads one Feoffee of the Conuſor, and not the other Feoffee, when the

the Burden ought to lie equally on them all.

THIS Writ of *Audita Querela* lieth as well upon Matter in Fact, as upon Matter in Writing, as after appears; and this Writ ſhall be directed unto the Juſtices of the *Common Pleas*, or *King's Bench*, and lieth where *A*, and *B* come before the Mayor, and *B* doth acknowledge himſelf to be bound in 100*l.* to *A*, in the Name of *C*, and afterwards *C* is arreſted by force of this Bond, and Statute, and taken in Execution; now *C* ſhall have *Audita Querela* againſt *A* and *B*, and the Form is ſuch,

Rex Juſtitiariis ſuis de Banco ſalutem. Querelam H. *de* M. *recepimus continentem, quod* I. I. S. I. *&* N. *Colluſione inter eos apud* Winton *præhabitâ, Curiæ noſtræ illudere, & præfatum* H. *callide prægravare machinantes, nuper coram* R. *Majore Villæ noſtræ* Southampton, *&* R. *Clerico ad recognitionem Debitorum apud* N. *accipiendam deputatis comparentes, ipſum* I. *de* L. H. *de* M. *Sacramento corporali ad hoc præſtito exiſtere aſſeruerunt, per quod idem* I. *de* L. *ſub Nomine ejuſdem* Henr. *præfato* N. *centum Libras ad certum Terminum jam præteritum ſolvendas, coram eiſdem Majore & Clerico juxta Formam Statuti dudum apud*

De Deceptione Audita Querela. Theloal. *Regiſtrum Brevium tam originalium quam judicialium, Edit.* 1687. *p.* 114, *Brev. Fitzherbert* Natura Brevium, Edit. 1755, p. 233.

11 *Ed.* *apud* Acton Burnel *pro Mercatoribus æditi ſe debere recognovit, & poſtmodum ipſum* H. *pro eo quod ipſe prædictas centum Libras præfato* N. *ad Terminum prædictum non ſolvit, per præfatum Majorem capi, & in Priſona ſalvo cuſtodiri, quouſque eidem* N. *de eiſdem centum Libris plene ſatisfecerit, falſo & malicioſe procurarunt, in ipſius* H. *Damnum non modicum, & Deceptionem* See ibid. 114. a. *Curiæ noſtræ manifeſtum, ſuper quo, &c. adhiberi nos, volentes eidem* H. *quatenus juſte poterimus, ſubvenire, vobis Mandamus quod Audita Querela ipſius* H. *in hâc Parte & vocatis coram vobis præfatis* I. I. S. I. & N. *ac præfatis Majore & Clerico, auditiſque hinc & inde Partium Rationibus eidem* H. *ſuper Falſitate, Malicia, & Deceptione prædictis, plenam & celerem Juſtitiam fieri facias, ut de Jure & ſecundum Legem & Conſuetudinem Regni noſtri* An- See ibid. p. 1. 113. a. *gliæ fore videritis faciendum, T. &c.*

Audita Querela, on Deceit. *Theloals* Regiſter of original and judicial Writs, p. 114. b. *Fitzherbert's* new Nature of Writs, p. 233.

'THE King, to his Juſtices of the 'Bench * Greeting. We have received 'the Plaint of H, of M, containing, that '*I. I. S. I.* and *N.* by Colluſion had be-'tween them at *Wincheſter*, to deceive 'our Court, and contriving ſubtily to 'aggrieve the aforeſaid *H*, lately appear-'ing before *R.* Mayor of our Town of '*South-*

* *That is Juſtices of the Common Pleas.*

'*Southampton*, and *R.* his Clerk, appointed to take Acknowledgments of Debts at *N.* aſſerted upon their Oath that they were the ſaid *I.* of *L. H.* of *M.* whereby the ſame *I.* of *L.* in the Name of the ſaid *Henry*, acknowledged themſelves to owe to the aforeſaid *N.* 100*l.* to be paid at a certain Time now paſt, before the ſame Mayor and his Clerk according to the Form of a Statute long ſince publiſhed at * *Acton Burnel*, for Merchants; and afterwards falſely and maliciouſly procured *H.* to be taken by the ſaid Mayor, becauſe he had not paid the aforeſaid 100 *l.* to the aforeſaid *N.* at the Time aforeſaid, and to be kept cloſe in Priſon, until he ſhould fully ſatisfy the ſame *N.* the ſame 100*l.* to the no ſmall Damage of *H*, and in manifeſt Deceit of our Court, whereupon, *&c.* to be exhibited. Fitzherb. new N. B. p. 233.

'We, willing to aſſiſt the ſaid *H.* as far as we juſtly may, Command you, that upon hearing the Plaint of *H.* in this Behalf, and ſummoning before you the aforeſaid *I. I. S. I.* and *N.* and the aforeſaid Mayor and his Clerk, and having heard the Reaſons of all the Parties you cauſe full and ſpeedy Juſtice to be done the ſame *H.* for the aforeſaid

'Falſhood,

* 11 *Edw.*

'Falſhood, Malice and Deceit, as you 'ſhall ſee of Right, and according to the 'Law and Cuſtom of our Kingdom of '*England*, ought to be done, Wit-'neſs, *&c.*"

THERE is a Diverſity where the Diſcharge comes by Determination of the Eſtate, for the Conuſor need not have any *Audita Querela*; as if Tenant in Tail acknowledges a Statute which is extended, and dies, the Iſſue ſhall avoid it by Entry, becauſe the Iſſue comes in * *per Formam Doni*, which is above the Statute, and in Diſaffirmance of it.

38 Aſſ. 5.
43 Aſſ. 18.
17 Ed. 3. 60.

IF a Man leaves Lands unto *A.* for Life, and afterwards by Fine grants the Reverſion unto *B* in Fee, and dieth, and the Heir of the Recognizor, and one *L*, by Covin betwixt them, ſue a *Precipe in Capite* againſt the ſaid *A*, ſuppoſing the Land to be holden of the King, whereas it is not holden of the King, but of another Perſon, and in this *Precipe in Capite*, they cauſe one *F.* to appear as Attorney for *A*, and to join the Miſe in the ſaid Writ, and afterwards the Attorney, by Covin, doth make Default, for which Judgment is given againſt *A*; now upon the ſaid Matter, he ſhall have an *Audita Querela*,

F. N. B. 233, 234.

* *By the Form of the Gift.*

Querela, directed unto the Juſtices of the *Common Pleas*, commanding them to proceed as well for the Reſtitution of the Lands, as upon the Deceit, and to do ſpeedy Juſtice as of Right, according unto the Cuſtom of the Realm they ought to do, and the Writ is ſuch.

Rex Juſtitiariis ſuis de Banco ſalutem. Monſtravit nobis Hugo *de* L. *Perſona Eccleſiæ de* B. *ut cum ipſe nuper Manerium de* C. *cum Pertinentiis in Comitatu* Leyc' *ad Terminum Vitæ ſuæ ex Dimiſſione* I. *de* L. *tenuiſſet, ac* Henricus *Filius & Hæres prædicti* I. *Manerium prædictum* Th. S. & R. *& Hæredibus de Corpore ipſius* R. *exeuntibus, ac* W. *jam defuncto ut dicitur, per Finem inde in Curiâ noſtrâ coram Juſtitiariis noſtris de Banco apud* W. *levatum, poſt Mortem prædicti* Hugonis *habendum conceſſiſſet*, G. *Filius prædicti* Henr. & L. *Colluſione intereos præhabitâ, præfatum* Hugonem *de Manerio prædicto amovere, & præfatos* T. S. & R. *de Reverſione Manerii prædicti excludere machinantes, Breve noſtrum quod vocatur* Precipe in capite *Vice-Comiti noſtro* Leyc' *ad certum Diem jam præteritum returnabile de Manerio prædicto, ac ſi idem Manerium de nobis teneretur* in capite *cum non teneatur, ſub Nomine prædicti* G. *verſus præfatos* Hugonem

Audita Querela Deceptione cum quis impetravit Breve Precipe in Capite per falſam Suggeſtionem, & fecerit Attornatos falſos Loco tenentis, &c. Reg. Brev. 114. b. ſee 41. E. 3. 37. 16 H. 7. 16. 47. E. 3. 4. 13. H. 7. 22. 45. E. 3. 17.

Fitzherb. new N. B. p. 334.

nem & Thomam *in Cancellaria noſtra impetrari, & Breve noſtrum prædictum, quod præfati* Hugo & T, *juxta Formam Brevis prædicti ſummoniti fuerunt eſſendi coram vobis ad Diem prædictum, per præfatum Vicecomitem retornari, ac quendam ignotum qui ſe* Richardum *de* S. *nominari aſſeruit coram vobis in Banco prædicto apparere ad lucrandum vel perdendum in Loquelâ prædictâ per præfatos* Hugonem & Thomam *attornari, ipſis* Hug. & Thom. *de Impetratione Brevis, ſummonitione ac Attornato prædicto ſub Nomine ſuo ut præmittitur Facto penitus ignorantibus, falſo & malicioſe procurarunt, ac præfatus Attornatus ad eundem Diem coram vobis comparens, poſuerit ſe in magnam Aſſiſam noſtram, & petierit Recognitionem fieri utrum ijdem* Hugo & Thomas *majus Jus habuerunt tenendi dictum Manerium cum pertinentiis ſicut illud tenuerunt, an prædictus* G. *habendum dictum Manerium ſicut illud petiit, per quod per Defaltam quam iidem* Hugo & Thom. *poſtmodum fecerunt in eâdem Curiâ, per vos conſideratam fuit ibidem, quod prædictus* G. *recuperaret Seiſinam ſuam de prædicto Manerio cum Pertinent' verſus præfatos* Hug. & Th. *tenendo eidem* G. & *Hæredibus ſuis quietum de prædictis* Hug. & Th. & *Hæredibus ſuis in Perpetuum, cujus quidem Conſiderationis Prætextu,*

textu, prædictus Hugo *a Manerio ſuo prædicto cum Pertinentiis perperam eſt amotus, in ipſius* Hugonis *Damnum non modicum, ac Curiæ noſtræ Deceptione manifeſta, ſuper quo præfatus* Hugo. *&c. adhiberi: nos hujuſmodi Colluſionem, Maliciam, & Deceptionem tranſire nolentes impunitas, vobis mandamus quod auditâ Querelâ ipſius* Hugonis *in hâc Parte, & vocatis coram vobis* G. *&* L. *&* R. *ac aliis quos in hâc Parte fore videritis evocand' & auditis hinc & inde Partium Rationibus, ulterius eidem* Hug. *tam ſuper Recuperatione & Reſtitutione dicti Manerii cum Pertinentiis, quam ſuper Colluſione, Maliciâ, & Deceptione predictâ plenam & celerem Juſtitiam fieri facias prout de Jure & ſcdm. Legem & Conſ. Regni noſtri* Angliæ *fore videritis faciendum,* T. *Anno* 17. *&c.*

Audita Querela on a Perſon's obtaining by Deceit and falſe Suggeſtion, a Writ of *Præcipe in capite*, and making falſe Attornies in the ſtead of the Tenant, *&c.*

'THE King, to his Juſtices of the 'Bench, Greeting. *Hugh* of *L.* Parſon 'of the Church of *B.* has ſhewn us, 'That whereas he lately held the Manor 'of *C.* with the Appurtenances in the 'County of *Leiceſter*, for the Term of his 'Life of the Demiſe of *I.* of *L.* and *Henry* 'Son and Heir of the aforeſaid *I.* granted 'the aforeſaid Manor to hold to *T. S.* 'and *R.* and to the Heirs of the Body 'of the ſame *R*, and *W.* now deceaſed, 'after the Death of the aforeſaid *Hugh*,

'as is ſaid, by a Fine thereof levied in
'our Court, before our Juſtices of the
'Bench at *W.* *G.* the Son of the afore-
'ſaid *Henry*, and *L.* by Colluſion con-
'certed between them, to amove the
'aforeſaid *Hugh* from the Manor afore-
'ſaid, and contriving to exclude the
'aforeſaid *I. S.* and *R.* from the Rever-
'ſion of the aforeſaid Manor, falſely and
'maliciouſly procured our Writ, which
'is called a *Precipe in capite*, of the
'Manor aforeſaid, to our Sheriff of *Lei-*
'*ceſter*, returnable at a certain Day now
'paſt, as if he had held the ſame Manor
'of Us in chief, when he did not hold
'it, to be obtained in the Name of the
'aforeſaid *G.* againſt the aforeſaid *Hugh*
'and *Thomas* in our *Chancery*, and our
'aforeſaid Writ to be returned by the
'aforeſaid Sheriff, that the aforeſaid
'*Hugh* and *T.* were ſummoned accord-
'ing to the Form of the aforeſaid Writ,
'to be before you at the Day aforeſaid,
'and ſome unknown Perſon, who aſſert-
'ed his Name to be *Richard* of *S.* to ap-
'pear before you in the aforeſaid Bench,
'to gain or loſe in the aforeſaid *Plaint*,
'by the aforeſaid *Hugh* and *Thomas*,
'their Attornies, the ſaid *Hugh* and *Thomas*
'being totally ignorant of the obtaining
'the Writ, Summonce and Attorney
'aforeſaid,

'aforeſaid, under their Names as afore-
'ſaid made, and the aforeſaid Attorney
'appearing before you on the ſame Day,
'put himſelf on our great Aſſize, and
'deſired that a Declaration might be
'made, whether the ſame *Hugh* and
'*Thomas* had more Right to hold the
'ſaid Manor, with the Appurtenances,
'as they held it, or the aforeſaid *G.* to
'have the ſaid Manor, as he demanded
'it; wherefore, for the Default which
'the ſame *Hugh* and *Thomas*, afterwards
'made in the ſame Court, you there con-
'ſidered that the aforeſaid *G.* ſhould re-
'cover his Seiſin of the aforeſaid Manor
'with the Appurtenances, againſt the
'aforeſaid *Hugh* and *Thomas*, to hold to
'the ſame *G.* and his Heirs quietly,
'from the aforeſaid *Hugh* and *Thomas*,
'and their Heirs for ever, by Colour of
'which Conſideration the aforeſaid *Hugh*
'is unjuſtly turned out of his Manor
'aforeſaid, with the Appurtenances, to
'the no ſmall Damage of the ſame *Hugh*,
'and manifeſt Deceipt of our Court,
'whereupon the aforeſaid *Hugh*, *&c.* Fitzherb. new N. B. p. 234.
'to be exhibited: We, unwilling that
'ſuch Colluſion, Malice, and Deceit,
'ſhould go unpuniſhed, Command you,
'that having heard the *Plaint* of the ſaid
'*Hugh*, in this Behalf, and having called

'*G.*

'*G.* and *L.* and *R.* before you, and 'others, whom on this Occaſion you 'ſhall ſee proper to be called, and having 'heard the Reaſons of all Parties, you 'further cauſe to be done full and ſpeedy 'Juſtice to the ſame *Hugh*, as well for 'the Recovery and Reſtitution of the 'aforeſaid Manor, with the Appurte-'nances, as for the Colluſion, Malice 'and Deceit aforeſaid, as you ſhall ſee 'ought to be done of Right, and accord-'ing to the Laws and Cuſtoms of our 'Kingdom of *England*, Witneſs, *&c.*"

AND by this Writ it ſeemeth the Juſtices ought to make void the Recovery if they find the Deceit, and yet it ſeemeth they may not do ſo.

A, Tenant for Life, Remainder to *B.* in Tail, *C* in Covin between him and *A*, brings a Formedon againſt *A* and *B*, ſuppoſing them joint Tenants and one *D*, 17 E. 3. 60. anſwers as Attorney for *B*, and Proceſs continues till they make Default after the Miſe joined, upon which Judgment final was entered, and *B* ſhews this Matter, and prays it ſhould be entered, that he came within the Year, that the Judgment might not bar him, for it was entered of Record.

SECONDLY,

SECONDLY, it was agreed that he ſhould have Reſtitution, but *A* ſhould not, becauſe he has forfeited his Eſtate.

THIRDLY, that he ſhould not have Reſtitution on a general Bill of Deceit, but he ought to have an *Audita Querela* in *Chancery* upon the Caſe; * *tam ſuper Reſtitutionem Tenementi faciendi quam de Deceptione puniendi*; ſo note, there is Reſtitution at leaſt where the Demandant is Party to the Deceit. A Writ of Deceit did not go out of the Rules in this, as it does in other Caſes; for in other Caſes it reſtores the Defendants as if there had been no Judgment; but it could not be ſo here, becauſe that *B* the Reverſioner makes a new Caſe on the Forfeiture of *A*, and therefore muſt bring his cauſe before the Court, by a new Writ of *Audita Querela*.

17 E. 3. 49.

9 H. 6. 44. 1 H. 4. 5. See Stat. 21. Jac. 26.

IF a Man be bound in a Statute-Merchant, and afterwards maketh a Feoffment of a Parcel of his Lands unto another Man, and of other Parcels unto another, and they recognize ſuch Execution on the Statute, and hath Execution againſt one Feoffee, that Feoffee ſhall have an *Audita Querela* againſt the other Feoffee, to ſhew Cauſe why he ſhould not have

F. New N. B. 235.

* *As well for reſtoring the Tenements, as puniſhing the Deceit.*

Execution of the Lands, as of the Lands which himſelf hath; the Execution being unequal, he muſt bring in the Conuſee to the other Co-feoffees in order to ſet the Execution aſide and to be reſtored to the mean Profits, and thereupon an *Elegit de Novo* ſhall be awarded.

NOTE by the * 16 & 17 *Char.* 2. *c.* 5. the Execution ſhall not be defeated, but he ſhall have Contribution againſt the other Feoffee; *ſee* Tit. *Elegit*, 13 *Ed.* 3. *Execution* 127; and alſo againſt the Conuſee; and by it he ſhall be reſtored to the Iſſue, and the Execution ſhall be defeated; *ſee* 45 *Ed.* 3. 17. 29 *Ed.* 3, 7. where there were two Conuſors of a Statute-Merchant, and the Lands of one only were delivered in Execution, who ſued a Writ to the Sheriff to deliver Lands of the other in Diſcharge and Aid of the other, and the Sheriff returned † *non eſt inventus*, and that none came on the Part of the Conuſee to take his Suit againſt the other, and the Court declared, that if upon that *Scire facias*, the Conuſee ſaid nothing, he ſhould either have Execution againſt the other, or be diſcharged, having regard to his Portion of the Debt; but before the Statute, the Execution was after a *Scire facias* to the Conuſee

* *Made perpetual by* 22 & 23 *Char.* 2 *chap.* 2.
† *Not found.*

Conuſee diſcharged, becauſe it was taken equally; *between Gaſcoign and Whaley.* Dy. 193, pl. 30. Bendl. 80. pl. 124.

If the Conuſor enfeoffees the Conuſee of part of the Lands, and his Son of the Reſidue, and dies, and the Conuſee ſues out Execution againſt the Son, the Son brings an *Audita Querela*, he ſhall be diſcharged of the Execution, * *eadem de cauſâ*; but no Coſts or Damages are recoverable, becauſe when the Conuſee has taken part of the Land, there can be no Proceſs againſt him to appropriate any Part of his Lands in Satisfaction of his own Debt, for it would be abſurd to make that his, which is ſo already, and the Execution being to be entire againſt all the Lands ſubject to the Judgment, he having diſcharged one Part by taking it to himſelf, he is the Cauſe why the Execution muſt fail againſt the other Cofeoffees; but he may have Execution againſt the Conuſor, for the Recognizance being undiſcharged, it ſtill remains a Debt, and may be levied on the Lands of the Conuſor, ſince the Lands in his Hands are bound in what Condition ſoever they are after the Alienation; and it is no Plea in Abatement, that there are three or more Feoffees to be contributory, for he is bound at his Peril to take Notice of the Lands that are contributory,

* *For the ſame Reaſon.*

for it is enough if they can ſhew the Execution to be erroneous in any one Inſtance, and therefore it is no Plea to the Co-feoffee that there are others; but if the Execution be ſet aſide, and any Execution be granted againſt ſuch Co-feoffee, where there are others, ſuch Co-feoffees may bring their *Audita Querela*. Note the Diverſity: if the Conuſor of a Statute-Merchant enfeoff divers Perſons ſeverally, and the Lands of one only are taken in Execution, he ſhall have an *Audita Querela* againſt the Conuſee to make the others contributory, and the Writ ſhall be directed to the Juſtices in Bank; but on a Statute-Staple, the Suit ſhall be made in *Chancery* by *Audita Querela* directed to the Chancellor, or by *Scire facias*, directed to the Sheriff * *quare Tenementa extenſa una cum Proficiis pro medio tempore, &c.* Becauſe the Statute-Merchant may be certified into any of the Courts, and the *Audita Querela* muſt be to that Court where it is certified, but the Statute-Staple is to be certified into *Chancery* only.

Dy. 331, 332, pl. 23.

F. New. N. B. 235.

If a Man be bound in a Statute-Merchant, and certain Indentures of Defeazance are made of the ſaid Statute, and after-

* *Why the extended Tenements with the Profits for half the Time, &c.*

afterwards the Conuſee doth arreſt the Recognizor, and impriſoneth him, and taketh the Defeazance from him, and then ſueth Execution upon the Statute, the Recognizor ſhall have an *Audita Querela* againſt him upon the whole Matter, for the Execution is contrary to his own Deed of Defeazance.

If at the *Niſi prius* in Treſpaſs, it be found for the Plaintiff, and Damages aſſeſſed, and before the Day in Bank, the Plaintiff releaſe unto the Defendant all Actions and Demands, and afterwards prayeth Judgment, and ſueth Execution thereupon, the Defendant upon that Releaſe ſhall have an *Audita Querela*; for he cannot plead this at the Day in Bank, nor before Judgment, nor can he have an *Audita Querela* to ſtay Judgment. F. New. N. B. 235.

Note, ſuch Releaſe is only a Bar to the Execution, becauſe the Day at *Niſi prius*, and *in Banco* on the Releaſe, comes too late to hinder the Judgment from paſſing; and therefore, it only precludes the Execution; and the Heir of the Recognizee may ſue an *Audita Querela* if he have Matters in Writing to diſcharge the Execution, becauſe he is injured by an erroneous Execution.

If a Man be bound in a Statute-Merchant, or Staple, and afterwards payeth the

Money according to the Statute, and hath the Statute delivered unto him, and cancelleth the ſame, and afterwards the Recognizee forgeth a new Statute in the Name of the Recognizor; the Recognizor upon the Statute cancelled, ſhall have an *Audita Querela*. *Contra*, if the Conuſor himſelf comes into *Chancery*, and prays a Re-extent, and it ſeems this Writ lies, if the Statute be delivered in Lieu of
43 Aſſ. 18. an Acquittance, but not cancelled; for if the firſt Statute were delivered up, and the ſecond forged, the Execution is unlawful; but if the Conuſor prays a new Extent, becauſe the Lands were extended at too little Value, he is eſtopped to ſay, that before ſuch Prayer, the Recognizor had delivered up the Statute.

7 H. 6. 42. If a Statute-Merchant, or Staple, be made by one unto another, and delivered into the Hands of a Stranger, to deliver upon Conditions performed, and the Stranger doth deliver the Statute before the Conditions performed, and the Conuſee ſueth Execution thereupon, the Recognizor ſhall have an *Audita Querela*.

A makes a Statute-Staple to *B*, and ſends it to *C*, to be delivered to *B*, upon Condition; *B* recovers this Statute by erroneous Judgment in a Writ of Detinue againſt *C*, when *A* was was warned, and the

the Deed is delivered to him by *C*, to *D*. *B* ſues Execution, *A* brings a Writ of Error: reſolved * *ut pendentibus Erroribus*, the Execution cannot be ſuperſeded.

If *A* reverſes the Judgment, this ſhall not defeat the Execution, for the Writ of Detinue determines only the Property of the Statute, and not the Validity of the Execution ſued upon it, and therefore if it be hurt by an illegal Execution, he muſt take his Remedy by *Audita Querela* as in all other Caſes, for an unjuſt Execution. 5 Co. 90. 8 Co. 142, 143.

If a Man ſueth forth an Execution upon a Statute, and hath Execution, and afterwards grants over the extended Eſtate, the Recognizor ſhall have an *Audita Querela* againſt the Grantee, without naming him who ſued the Execution, if he have Matter in Writing to ſhew, *&c.* Becauſe when the Eſtate is diſcharged, the Conuſor has nothing to do but to ſue to recover back, and therefore, is only concerned with him that has the Intereſt in it. F. New N. B. 236.

If Execution be awarded againſt the Feoffee, he ſhall have an *Audita Querela*, upon a Matter of Diſcharge happening, either before the Feoffment, or after it, 7 *E.* 3. 27. Or he ſhall have a Writ of 17 Aſſ. 24.

* *Pending Error.*

Error; but if Execution be actually executed, and after ſuch Extent, the Conuſor makes Feoffment, it ſeems that the Conuſee ſhall not have an *Audita Querela*, on a Cauſe of Diſcharge happening before the Feoffment; as if after the Extent, and before the Feoffment or before the Extent executed, the Conuſee had acquitted the Debt to the Conuſor, before ſuch Feoffment, as ſeems by better Opinion; for the Feoffee takes the Land with the Burthen, and the *Choſe* in Action in the Conuſor cannot be transferred; but upon a Matter which happens after the Feoffment, the Feoffee ſhall have his *Audita Querela* * *ad computandum.*

Mo. 661. pl. 906.

17 Aff. 24.

IN a *Scire facias* * *ad computandum*, four Things are obſervable.

FIRST, by whom it lies; it lies by Grantee of the Reverſion with Attornment, and there he ſhall account *ab Initio*; ſo if a Man acknowledges a Statute, and afterwards acknowledges a ſecond Statute, there the ſecond Conuſee ſhall have a *Scire facias* againſt the firſt, to receive the Money which is to be levied, if the Tenant to the frank Tenement will not ſue.

6 E. 3. 53.
25 E. 3. 53.
38 E. 3. 12.

WHERE a Man makes a Feoffment of Lands, and they are afterwards extended, if

* *To account.*

if ſuch Extent is illegal, the Feoffee has all the Remedy the Feoffor had to diſcharge the Lands, ſince it is but reaſonable he ſhould defend himſelf againſt all illegal Extents, as the Perſon could have done from whom he had the Land, and therefore if it were diſcharged before the Statute, the Feoffee may relieve himſelf by *Audita Querela*; but if the Lands were actually extended, and then the Conuſor had made a Feoffment, there the Feoffee can never diſcharge himſelf by ſhewing a Releaſe, or any other Matter precedent to the Feoffment, becauſe when the Lands are actually extended, the Feoffor by ſuch Releaſe of the Conuſee, had not the actual Poſſeſſion of the Lands, but only a Right to recover them, and not a Right of Entry, ſince the Eſtate was extended by a judicial Proceeding, but a Right of Action only, to recover it by an *Audita Querela*; and though if the Feoffor had a Right of Entry, making an actual Entry in order to enfeoff it, would have transferred ſuch Right, yet here having only a Right of Action, and not a Right of Entry, it cannot be tranſferred, for it would be Maintenance to transfer a *Choſe* in Action, and therefore, here the Feoffment conveys only a Reverſion

verſion of the Lands, after the particular Eſtate gotten by the Extent is determined.

50 E. 3. 46. 16. 38 E. 3. 12. 21 E. 3. 1. 46 E. 3. Scire facias 134. 15 E. 3. Reſpond. 3.

SECONDLY, againſt whom it lies; if the Conuſee had leaſed, or aſſigned but Part of the Eſtate, the *Scire facias* ſhall be brought againſt the Conuſee only, and not the Leſſor; but if he has aſſigned the Whole, and the Aſſignee has levied the Whole, or the Plaintiff will pay the Reſidue, the Writ lies againſt the Aſſignee only, and he ſhall retake or repay the Money; but if the Conuſee has levied the Whole, and after aſſigns, the Writ lies againſt them both; for the Conuſee has but a particular Eſtate till the Money is paid, and therefore after Payment, the Conuſee ought to have a *Scire facias* to have his Lands again, that it may be unbound, * *a Ligamine a quo ligatur*; but one of them may anſwer without his Companion, and yet the Conuſee may releaſe, notwithſtanding the Aſſignment, for the Contract is between the Conuſor and Conuſee, and the Conuſee may releaſe his own Contract, and thereby the Intereſt of the Aſſignee is deſtroyed, who has no Remedy but in a Court of Equity.

47 E. 3. 11. 32 E. 3. Scire facias 101.

THIRDLY, when this Writ lies, it lies after the Debt and Damage are levied by caſual

* *From the Bond whereby it is bound.*

caſual Profit, by Courſe of Time, or by Render of the Money, or by any of them. 46 E. 3. Scire facias 134. Regiſter Judic. 73.

FOURTHLY, the Effect of the Suit; the Writ is ſometimes † *ad computandum* againſt the Opinion in 22 *Aſſize* 44, and ſometimes † *ad computandum*, and to receive the Reſidue of the Money, and have back the Lands; but not to have back the Land and anſwer for the Waſte; for it ſeems that he may have a Writ of Waſte: and note, if the Tenant by the caſual Profits has levied more than by Debt and Damage, the Surplus ſhall be paid to him in Reverſion, if it was levied in his Time, or at leaſt as much as was levied over; and the Tenant ſhall account to the Grantee * *ab Initio*; for perchance the Term was not determined before the Grant of the Reverſion; but he ſhall not account according to the Extent; for if the Land was extended too low, the other at the former Day might have had a Re-extent, but afterwards he has no Remedy but to pay the Money; therefore the *Scire facias* † *ad computandum*, ought to ſhew what the caſual Profit is; *yet ſee* 20 *E.* 3. *Extent* 18. *contr.* by *Wilby*. 21 E. 3. 26. 30. 6 E. 3. 63. 22 Aſſ. 44. 19 Ed. 3. Extent 12. 32 E. 3. Scire facias 101.

IF the Land on the Extent be extended too low, the Conuſor may have a Re-extent,

* *From the firſt.* † *To accompt.*

tent, and ſettle the true Value; but after the *Liberate* it comes too late; becauſe, by the *Liberate*, the Land is delivered for the Value of the Debt, to hold till the Debt is ſatisfied, and therefore the Conuſee muſt account according to ſuch Value; but on an *Elegit*, or a Recognizance in the King's Court, there is no *Liberate*, for the Statute has given the Aſſize, or Ejectment that comes inſtead of the Aſſize.

A MAN may ſue an *Audita Querela* againſt the Recognizance, becauſe he hath purchaſed a Manor into which the Recognizee is a Villain Regardant, and yet he may enter and ſeize the Recognizee without Suit; and a Stranger who made not the Recognizance, nor was Tenant of the Land at the Time of the ſuing forth of the Execution, ſhall have an *Audita Querela*, if he have Matter of Diſcharge in writing; and there it is ſaid, the ſame is given by the Statute.

20 E. 3. Tit. *Audita Querela.*

THE Feoffee ſhall not have a Writ of Error, *&c.* nor the Feoffee of the Conuſor of Part of the Lands ſhall not have an *Audita Querela*, until his Lands be taken in Execution; for there is no Cauſe of Complaint but on the Execution.

17 E. 3. 27. 43 E. 3. 28. Danv. Abr. 631. pl. 6. 24 E. 3. Tit. *Audita Querela*, 11. & 29.

IF a man ſueth an *Audita Querela* againſt the Conuſee, and ſheweth a Statute cancelled, and ſaith the ſame was delivered

vered to him in Lieu of an Acquittance; the Recognizee may ſue the true Statute, and ſhew, that the Statute ſued, which was cancelled, was a forged Statute; and thereupon he ſhall have a Writ unto the Juſtices in the Nature of an *Audita Querela*, commanding them, that they ſend for the Mayor, and the Clerk, and for the Parties, to do right; and the Examination of the Mayor and Clerk, ſhall try and end the Matter; *which ſee.* In ſuch caſe Execution ſhall be awarded, if the Conuſor do not ſue the Statute. 18 Ed. 3. 36.

THE Rule is, that if the Conuſee ſhews the Statute in his Poſſeſſion, he ſhall have Execution, unleſs the Conuſor ſhews the Statute in his Poſſeſſion as delivered up; and then a *Scire facias* iſſues to the Mayor and Clerk, and they are to be examined to know which is the true Statute.

UPON a Recovery of a Debt, if he ſue a *Scire facias*, and the Sheriff returns *nihil*, by which an Execution is awarded, the Defendant ſhall have an *Audita Querela* if he have a Releaſe or Acquittance, becauſe he was warned; but if the Sheriff hath returned him warned, he ſhall not have an *Audita Querela* on ſuch Releaſe, &c. becauſe he might have pleaded the ſame upon the Return of the *Scire facias*; *ſee* the Caſe, where it is alſo holden, that if the *Scire facias* be

21 E. 3. 13. be not ſerved, yet the Party may come and plead.—See a *Scire facias* by a Biſhop, againſt an Executor; the Sheriff returns, that he was * *Clericus beneficiatus de Bonis & Catallis eccleſiaſticis*, whereupon a *Fieri facias* iſſued to the Ordinary: (Note, he was not charged as Executor.) It was reſolved firſt, altho' the Executors had a Co-executor, yet, if he only was grieved, he only ſhould have this Suit.

21 E. 3. 48. SECONDLY, That this Suit lies notwithſtanding the *Scire facias*.

Note, this was a *Scire facias* againſt the Executors of a Biſhop, who had made an Agreement in Court to deliver Goods which were his Predeceſſor's to his Succeſſor; on this Writ the Sheriff returns, that the Defendants † *nullum habuerunt Feodum laicum*, but were beneficed, which amounted to a *nihil*: The Judgment being revived, the Biſhop ſued a *Fieri facias* ‡ *de Bonis eccleſiaſticis* in the firſt Inſtant, becauſe it appeared in the Sheriff's Return, that they were beneficed.—If the Plaintiff and Defendant both make Default on the ſaid *Scire facias*, yet an *Audita Querela* lies on a Releaſe made before, otherwiſe it is if the Defendant

* *A beneficed Clerk of eccleſiaſtical Goods and Chattels.*
† *Had not any Fee.* ‡ *Of eccleſiaſtical Goods.*

dant makes Default, and the Plaintiff appears; becauſe, when the Plaintiff does not come into Court, the Defendant is not obliged to appear, and therefore the Defendant may bring his *Audita Querela* to ſet aſide ſuch an unlawful Execution, as if no Day had been given.—Executors bring an Action of Account, and obtain Judgment againſt the Defendant * *quod computet* for the Arrears; and after the Will is annulled in the Spiritual Court, the Defendants ſhall have an *Audita Querela*, becauſe, by annulling the Will, the Plantiff is not intitled to have Execution on the Judgment.

Note, where the Sheriff returns *nihil*, and the Party does not appear, the Judgment is revived by ſuch Return of the Sheriff, becauſe the Party does not come in to ſhew Cauſe why it ſhould not be revived; but the Plaintiff takes out Execution at his Peril; for if the Defendant has any Releaſe, or Matter to diſcharge the Execution, he may nevertheleſs bring an *Audita Querela*, becauſe he was not in Court to ſhew ſuch Matter in diſcharge of the Execution; but if he is returned warned, and had a Day in Court to ſhew it, he can never afterwards bring an *Audita Querela*.

BUT

* *To accompt.*

BUT if one of the Feoffees of a Recogniſor be returned warned, tho' he does not ſhew that there were other Co-feoffees upon his Day in Court, yet, if he alone is charged in Execution, he may have an *Audita Querela*; becauſe the Plea, that there are other Feoffees is not a Diſcharge of the Action, and ſuch *Audita Querela* is not brought to bar the Execution totally, but to make it equal.

Co. Mag. Chart. 673. F. N. B. 104. (K). Dy. 132. b. pl. 9. Ander. 25. pl. 54. Bendl. 80. pl. 123. Mo. 75. pl. 206. 2 Ander. 158. pl. 87. 10 Rep. 43, a.

AND if an Infant bind himſelf in a Statute-Merchant, or Staple, he ſhall have an *Audita Querela*, during his Nonage, to avoid that Statute, and afterwards he ſhall have an *Audita Querela* after his full Age to avoid that Statute upon that Matter in fact; but note, the Law is, he ought to bring his *Audita Querela* while he is yet within Age; for he ſhall not avoid the Statute by ſaying generally that he is within age, but muſt ſay * *tunc & adhuc infra ætatem exiſtens*, for contracting in Court he cannot avoid it, unleſs by Inſpection, which is an Act of equal Notoriety; *Harriſon* and *Worley* adjudging, that he ought to bring his Writ and reverſe it during Minority. But where an Infant gives a Warrant of Attorney, and Judgment is thereon confeſſed, this is not to be reverſed on an *Audita Querela* by Inſpection,

* *Then and ſtill being under Age.*

Inſpection, but by Writ of Error at any Time, and the Fact to be tried by a Jury; for here the Infant does nothing himſelf in Court, and therefore there is no Act of his in Court which ought to be ſet aſide by act of equal Notoriety, but the giving the Warrant of Attorney is an Act in *Pais*, and if done by an Infant, is a void Act, and whether the Perſon that gave the Authority be an Infant or not, is a Matter in *Pais* to be tried by a Jury, and conſequently that may be tried at any Time.

And if the Attorney's Warrant was void, then had he no Authority to appear, and then the Infant was never in Court, and then the Judgment of the Court againſt him was erroneous, and this muſt be reverſed by Writ of Error, but not by *Audita Querela*; becauſe here the Complaint is of the Illegality, and Error of the Judgment, and not of the Execution; but when the Infant appears in Perſon before the Judge, there can be no Complaint of any Want or Default in the Appearance, becauſe that were to arraign the judicial Act of the Judge; but if that judicial Act be ſet aſide by an Act of Notoriety, then it goes for nothing; therefore here the Complaint muſt be of the Parties being liable to an unlawful

Execution, whereby the ſame Judge on this Writ may be brought to reconſider the Legality of the Caption of the Recognizance, and that does not arraign the judicial Act, as colluſive and unjuſt, before any Superior, for that is not proper and congruous to examine his mere Errors, and Miſtake in Judgment before his Superior; and ſo if a Man makes a Statute-Merchant, or Staple by Dureſs, he ſhall have an *Audita Querela* to avoid that Statute by this Impriſonment, becauſe here may be a Compulſion which does not appear to the Judges; if two be ſeverally bound in two ſeveral Statutes, and afterwards the Recognizee, by Deed doth releaſe both the Statutes to one of them, if he ſue Execution againſt them ſeverally, they ſhall join in *Audita Querela* upon that Releaſe; for though they are ſeverally bound, it is but in one Sum, and therefore if either be taken in Execution they may join in an *Audita Querela*. It ſeems that Tenants in Common being only Tertenants, need not join in an *Audita Querela*.

If the Recognizor enfeoff a Stranger of Parcels of Lands and afterwards the Recognizee ſue the Execution againſt the Recognizor and the Feoffee, the Feoffee ſhall have an *Audita Querela* againſt the Recognizee,

Recognizee, and diſcharge his Lands, because that the Recognizee hath diſcharged his Parcel of Land, which he purchaſed by his own Act, and therefore the Exeeution againſt the Co-feoffees is diſcharged; upon an *Audita Querela* ſued he ſhall have a *Superſedeas* to the ſame Writ, to ſtay Execution, *&c.* but if he be nonſuited he may have an *Audita Querela*, but then he ſhall not have a *Superſedeas* to ſtay Execution; for if the ſecond *Audita Querela* ſhould be a *Superſedas*, the Plaintiff by not proſecuting his own Writ, might delay Execution **in infinitum*; if the Conuſee ſues diverſe Certificates, and upon one of them has a Writ returned in the *Common Pleas*, and the Conuſor purchaſe an *Audita Querela*, and upon another Certificate has a Writ returned in the *King's-Bench*, and the Party is taken thereon, he ought to ſue a Writ to the Mayor and Clerk, to certify if he has other Statutes, and if not, he ſhall be aided, *viz.* by *Audita Querela*; becauſe he has made his Election to have his Statute certified into the *Common Pleas* where the Execution is bound by an *Audita Querela*, and a Man ſhall not have an *Audita Querela* ſuppoſing the Recognizee will ſue Execution, but it ought to be alledged in the Writ, that he hath † *in facto*

Plowd. 72.

29 Aſſ. 29.
29 Aſſ. 41.
21 H. 6. 314.

Danv. Abr. 631. pl. 6.

* *Infinitely.* † *In Fact.*

ſued Execution, for till Execution is ſued, there is no Cauſe of Complaint.—If a Man ſue an *Audita Querela* upon a Releaſe, and afterwards is nonſuited, he ſhall not have an *Audita Querela* upon new Matter, **ut dicitur*; but it ſeemeth the Law is otherwiſe; but he ſhall not delay Execution by a new *Audita Querela*, for the *Audita Querela* is a new Action, which he may have as often as there is Cauſe of Complaint, though nothing ſhall ſuperſede Execution but the firſt *Audita Querela*.

43 E. 3. 28.
17 E. 3. 27.
43 E. 3. 28.
24 E. 3. Audita Querela 11 & 29.
33 E. 3. Executors 61.

Cro. El. 809, 810.

For ſince a Man may have ſeveral *Audita Querela's* on different Cauſes, he may put different Cauſes in the ſame Writ; but to avoid Duplicity he ſhall inſiſt upon one only. If a Man doth comprehend two Matters in the *Audita Querela* to extinguiſh the Execution, yet the Writ is good, but the Plaintiff ſhall hold himſelf to one Matter, and the Defendant ſhall anſwer to that, and Variance betwixt the *Audita Querela* and the Record ſhall abate the Writ; but if there is a new *Audita Querela* ſued according to the Record, he ſhall have a *Superſedeas* to ſtay Execution, *&c.* although he had before a *Superſedeas* in the other *Audita Querela*, which was abated; becauſe the firſt *Superſedeas* † *erronice emanavit*.

Ir

* *As is ſaid.* † *Iſſued erroneouſly.*

If a Man ſue Execution upon a Statute-Merchant, and hath a *Capias* returned into the *Common Pleas*, if the Feoffees or Parties will ſue an *Audita Querela*, they ought to ſue the ſame out of the *Chancery*, directed unto the Juſtices of the *Common Pleas*; becauſe it is an original Writ, to give them Authority to hold Pleas.

If a Man ſue an Execution upon a Statute-Merchant, as Executor unto another, the Party ſhall not have an *Audita Querela*, ſuppoſing in the Writ, that he who hath ſuch Execution is not Executor, for he ought to have pleaded this to the *Scire facias* brought by the Executor.

But if *Nihil* had been returned, it ſeems *Audita Querela* would lie, becauſe he had no Day in Court by the *Scire facias*, and the Proceſs in *Audita Querela*, is *Venire facias, & alias, & pluries diſtringas*, and if he returns *Nihil*, or **non eſt inventus*, he ſhall have *Capias* againſt the Defendant. The Diſtreſs may be of the Lands, which he had the Day of the *Audita Querela* purchaſed, and before the *Diſtringas* ſued, the Conuſee ſhall not be ouſted.

18 E. 3. 36. 38 E. 3. 1. 21 H. 6. 56. See 48. E. 3. 1. 31 E. 3. Audita Querela, 24.

This Writ of *Capias* in *Audita Querela*, is not expreſly given by any of the

20 E. 3. ib. 28. 30.

* *Is not found.*

Statutes; but is either conſtrued to be within 19 *H.* 7. *cap.* 9. which gives a *Capias* in Action on the Caſe, or elſe is founded on a Contempt that the Defendant is guilty of in abuſing the Proceſs of the Court, and then withdrawing himſelf.

12 H. 4. 6. & 15. THE true Difference between the *Venire facias* and *Scire facias* in the *Audita Querela* is, that whenſoever the *Audita Querela* is grounded upon a Matter in Fact, a *Venire* is the proper Proceſs, becauſe there is no Record on which a *Scire facias* can iſſue; as if a Man releaſes the Judgment, and afterwards takes out a *Capias*, and * *non eſt inventus* is returned, there no *Scire facias* can iſſue, becauſe there is no Record to warrant ſuch Writ; but if * *Cepi Corpus*, or an Extent be returned on an *Elegit*, there is a Record from which a *Scire facias* may iſſue, and therefore the Writ may then go out, for where there is a Grievance on Record, there is proper Matter for a *Scire facias*.

Salk 92. Mo. 84. Leon 140.

Fitz. Herb. Abr. Tit. *Audita Querela* 36. *A.* enfeoffs *B.* on Condition to re-enfeoff *A.* and *C.* his Wife for their Lives, Remainder to *D.* Daughter of *A.* and the Heirs of her Body, and the ſaid *B.* by Colluſion between him and *E.* made a Recog-

* *Is not found.* † *I have taken the Body.*

Recognizance of 200 *l.* to *E.* and one *F.* (after the Enfeoffment as it ſeems.) *A.* dies, and *C.* takes *G.* to Huſband, who upon this Matter ſues an *Audita Querela*. It was reſolved, that he need not **count* in this Writ; for the Writ itſelf is a Count, unleſs where it contains diſtinct Matters, and then he muſt count in order to make his Election, for the Defendant is obliged to anſwer one Matter only, although he might have Remedy by Writ of Deceit, or Conſpiracy; yet in as much as here is Matter of Record which is the Foundation of this Writ it is good; but becauſe *E.* was Party to the Recognizance, and by the Writ is ſuppoſed Party to the Colluſion, and is not made Party to the Writ, the Writ ſhall abate, for that this Writ is to defeat the Recognizance, and not to recover Damages; for ſince the Recognizance is to be defeated, he that has the Intereſt in the Recognizance is to be made a Party; if Execution be ſued againſt the Feoffee, upon a Statute acknowledged before the Mayor of *C.* who has no Authority to take it. *Audita Querela* lies, for being received by the Court above, as the Record of a Perſon having Authority, it muſt be ſet aſide by *Audita Querela*. 26 E. 3. 73. 29 H. 8. Dy. 35.

* *Which is the ſame as to* declare *in perſonal Actions.*

A Man recovereth by Default in an Action of Waſte, the Defendant ſueth an *Audita Querela*, directed unto the Juſtices out of *Chancery*, ſurmiſing in the Writ that he was not ſummoned, nor attached, nor diſtrained, for which the Juſtices grant out of the Rolls in the *Common Pleas*, a Writ of Deceit againſt the Party, for the *Audita Querela* was but a Commandment to the Juſtices to do Right unto the Party, *&c.* and ſo they proceeded upon the Writ of Deceit, and not upon the *Audita Querela*; the *Audita Querela*, being generally to do Right to the Parties, they obey the Writ where they grant a Writ of Deceit out of the Rolls.

If a Man be bound in a Recognizance in the *Common Pleas*, and afterwards doth releaſe unto the Party, and then againſt his Releaſe ſueth Execution; then he ſhall come into the *Common Pleas*, and ſhall ſue an *Audita Querela* thereupon out of the Rolls; and ſo if one recovers in the *Common Pleas*, or *King's-Bench*, Debt, or Damages, and afterwards by his Deed releaſeth the ſame, and afterwards ſueth forth Execution upon the Recovery, the Party to whom he releaſed ſhall have an *Audita Querela* out of the *Common Pleas* or *King's-Bench*, where the Record is, and yet he may have an

Audita

Audita Querela out of the *Chancery*, and ſo it ſhall be ſometimes judicial, and ſometimes original. A Man may complain of an unlawful Execution in *Chancery*, for no Body is to go away from that Court without Remedy; and he may likewiſe apply himſelf to the Court, which granted the Execution, becauſe the taking it out unlawfully, was an Abuſe of their Proceſs.

If the Party comes in into Cuſtody by *Cepi Corpus*, or *reddidit ſe*, at the Exigent, he ſhall have a *Scire facias* * *ad cognoſcendum vel ad diſcendum factum*; but if he tender himſelf to appear at the Exigent, and doth not come in *Perſon*, he then ſhall not have a *Scire facias*, but is put to his *Audita Querela*; for there muſt be a *Cepi Corpus*, or *reddidit ſe*, to entitle him to a *Scire facias*, ſince there is not otherwiſe any Record from whence the *Scire facias* can iſſue; for there is no Record of an Execution executed, contrary to the Force and Effect of the Deed. Dy. 285. 286. pl. 41. 33 E. 3. Execution 161.

Note, where any one is taken in Execution againſt the Plaintiff's own Deed, there a *Scire facias* on ſuch will go * *ad cognoſcendum vel ad diſcendum factum*, without any *Audita Querela*, which is called Cro. El. 634, 635.

* *To know or learn the Fact.*

called by the Books a *Scire facias*, in Nature of an *Audita Querela*: For on the Complaint of the *Priſoner*, and ſhewing the Deed, it ſeems that the Court is concerned to iſſue Proceſs, to know whether ſuch Execution be lawfully iſſued or not; and therefore, if an *Audita Querela* be brought in this Caſe, you may have a *Scire facias*, as you might if no ſuch Writ had been brought.

And if a Man be bounden in a Satute-Merchant, or Staple, unto another Man, and afterwards the Recognizee makes a Defeazance unto the Recognizor; now, if the Recognizor ſue Execution upon the Statute againſt the Form of the *Indentures*, the Recognizor (or his Executors, if he be dead) may have an *Audita Querela* againſt the Recognizee, becauſe the Execution is unlawful againſt his own Defeazance.

And it appeareth in the Regiſter, that a Writ of *Audita Querela* lieth for an Infant who hath entered a Statute-Merchant or Statute-Staple during his Non-age; if he be yet within Age, ſee before—

Plowd. 72.
Regiſt. 149. 150.

And another *Audita Querela* appeareth in the Regiſter for the Feoffee of Parcel of the Lands, which belonged to the Recognizor againſt the Recognizee; becauſe that

that the Recognizee hath purchaſed other Parcels of the Lands of the Recognizor. Cro. El. 756.

If a Man be arreſted and impriſoned upon a Statute-Merchant, and afterwards the Recognizee doth releaſe unto the Recognizor, or he pay the Debt, and hath Acquittance, or pay Parcel, and hath a Releaſe for the Reſidue; then they may come into the *Chancery* at a certain Day, and there pay the Money, *&c.* if he cannot diſcharge himſelf by Acquittance or Releaſe; and thereupon he ſhall have a Writ unto the Sheriff where he is in Ward, rehearſing how he hath found Securities in the *Chancery*, commanding him to deliver him, if he keeps him in Priſon, for that Cauſe, and for no other Cauſe, and upon that he may have an *alias* and *pluries*, and Attachment againſt the Sheriff, if he will not deliver him, *&c.* for the Releaſe is a ſufficient Ground for the Court to ſet him at Liberty upon Security given.

But if a Man be arreſted, and impriſoned upon a Statute-Staple, and he hath Acquittance or Releaſe to diſcharge himſelf, then, if he will ſue *Audita Querela*, or *Scire facias*, to avoid the Execution of that Statute, he ought to give Surety, as well to the Party as to the King, in

in the *Chancery*, ſeverally in a certain Sum, *&c.* to ſue with Effect, and to render his Body, or pay the Money, *&c.* otherwiſe he ſhall not be delivered out of Priſon; and the ſame is by Force of the Statute 11 *H.* 6. *Cap.* 10.

Bro. Abr. Tit. *Charter of Pardon*, pl. 4. Fitz. *Audita Querela*, 34.

No *Audita Querela* lies againſt the King; but if the King releaſes between the Day in *Niſi prius*, and the Day in Bank, it diſcharges the very Debt, becauſe the King's Releaſe being of Record, is of as high a Nature as the Judgment.

But if there be a Fine in that Judgment, tho' it releaſes the Debt, it doth not releaſe the Fine, becauſe the Fine is ſubſequent to the Releaſe, and therefore not comprehended in the Releaſe precedent to it, and the Party to whom ſuch Debt is releaſed, may at any Time come into Court in proper Perſon, and plead ſuch Releaſe both in Diſcharge of the Debt, and of the Execution, becauſe the King is always in Court, ready to hear the Complaints of his Subjects, without any formal Proceſs; but he cannot plead ſuch Diſcharge by his Attorney, becauſe the Warrant of Attorney ceaſes after the Judgment.

Bulſtr. 57. Danv. Abr. 636.

A man muſt have a Deed of Releaſe to diſcharge an Execution, and to found an *Audita Querela* upon, becauſe nothing will eſtope

eſtop the Party from taking out Execution; but the Deed, for a verbal Contract, creates no Eſtoppel; for if this were conſtrued to create an Eſtoppel to the Execution, 'twould have this Danger, that it would draw all Executions into Queſtion after Judgment pronounced, and ſo no body by the Judgment come to the Effect of his Suit; but if after Judgment the Money is paid, and Execution iſſues, the Party has only an Action on the Caſe to recover Damage; ſo, if there were Articles of Covenant, that the Plaintiff ſhould diſcharge his Judgment, this would not be a ſufficient Foundation to diſcharge an Execution after iſſued, becauſe the Execution is not releaſed; but the Party has taken another Method by Covenant, that he ſhall releaſe it, and ſets up his Reſt in the Damages he is to obtain for the Breach of ſuch Covenant. Cro. Jac. 218.

But if on a Statute, the Cognizee ſues Execution, and the Conuſor pays the Money, as he may, becauſe the Lands and Goods are to be delivered to the Plaintiff, and therefore he may pay the Money in purſuance of the Execution to the Plaintiff himſelf, as well as to the Sheriff, and therefore ſuch Payment is in purſuance of the Execution; and by conſequence, if the Cognizee takes a ſecond Execution, the

Regiſt. 37. the Conuſor may have an *Audita Querela (quere)* without Releaſe, becauſe the Money was paid in purſuance of the firſt Execution.

THE Judgment for the Plaintiff in this Writ is, that the Defendant ſhall be barr'd of all Execution, and where an *Elegit*, or a *Fieri facias* has been taken out, the Plaintiff ſhall be reſtored, but no Damages.

Dy. 194. Abr. Tit. *Damages* 28. 135. Contra.

47 E. 3. 1. Fitz. *Audita Querela* 2. 13. 7.

BUT where the Writ of *Audita Querela* is in Nature of a Deceit, as where an Attorney appears that has no Authority; where a Mayor certifies a Statute that has no Authority; or that having Authority returns a Statute, where the Conuſor was either damaged or in Dureſs, or *Feme covert*, and there the Judgment is, that ſuch Judgment or Recognizance ſhall be annulled, where the Judgment is for the Defendant, it is * *quod eat ſine die*; and where the firſt Execution is ſuperſeded, the Judgment is † *quod habeat Executionem Judicii prædicti*, becauſe, when the firſt Execution is ſuperſeded, they muſt adjudge him a new Execution; but if it be on Goods and Lands, it is only ‡ *quod eat inde ſine die*, becauſe the old Execution continues.

CER-

* *That he go without Day.* † *That he have Execution of the aforeſaid Judgment.*

‡ *That he ſhall go hence without Day.*

CERTIORARI.

A CERTIORARI is a Writ by which all Records are removeable from an inferior to a ſuperior Court, or the Tenor of a Record of a ſuperior or inferior Court, is removed into the Court of *Chancery*; and here we muſt note, that the King's Courts being ſuperior to all others, they are to keep them in their proper Bounds, and therefore, in any Caſe, they can write to the inferior Courts to *certify* their Records, to ſee whether in ſuch Records they keep themſelves within their proper Bounds or not; and on ſuch *Certiorari*, the inferior Court muſt *certify* the Record itſelf, that the Court above may ſee whether in ſuch Record, the inferior doth keep itſelf within its proper Bounds; but where the ſuperior Court doth not ſend for the Record of the inferior Court, to ſee whether they keep within their Limits, but only * *Nul tiel Record*, to know whether there be ſuch a Record or not; there is this Diſtinction, that where the ſuperior Court can't proceed on ſuch Record, there it is ſufficient to ſatisfy that Purpoſe; and if on an Information of Recuſancy, the Defendant pleads an Indictment before a Seſſions of Peace and Conviction, and the

* *No ſuch Record.*

the Plaintiff pleads * *Nultiel Record*, it is ſufficient to *certify* the Tenor of the Record, becauſe the only Reaſon of ſending for the Record, is to ſee whether there be ſuch Record or not, and not to proceed thereon; but where the *King's-Bench* ſends for the Records of any inferior Juriſdiction, to ſee if they are kept within their Bounds, there, if that Court can proceed on ſuch Record, they muſt *certify* the Proceedings as they ſtand below, and the *Certiorari* ſtops them from proceeding any further; but if the *Certiorari* is delivered after the Jury are charged with the Evidences, the inferior Court muſt proceed to take the Verdict and *certify*, becauſe the Jury are ſworn † *ad inquirendum Veritatem*, and the Intent of the *Certiorari* was not to ſtop ſuch Trial.

Salk. 144.

Seſſ. Caſ. 250. Barnard, K. B. 105.

WHEN the Record comes up into the *King's-Bench* by *Certiorari*, they ſhall go on there, as they did in the inferior Court below; but in civil Caſes, they ſhall go on *de Novo*; but if they can't go on there, the Court will grant a *Procedendo* before ſuch Record filed; but after filing, no *Procedendo* is granted, becauſe they never part with a Record; but ſome have ſaid, that the Court will grant a *Procedendo* the

6 Mod. 17. 33. 40.

* *No ſuch Record.* † *To enquire the Truth.*

the ſame Term though it were filed, becauſe the Filing the ſame Term was irregular, if the inferior Juriſdiction had proceeded well, and there had been a Reaſon for their further Proceeding; but where the inferior Juriſdiction had its full Effect, there they may file it immediately; in *Chancery* they only *certify* the Tenor of the Record, for the *Chancery* ſends for the Record not to bound their Juriſdiction, but to ſend it to other Courts by *Mittimus*, and therefore on *Nul tiel Record* pleaded to a Record of a ſuperior Court, there is no way to have it but by *Certiorari* and *Mittimus* from the *Chancery*; for one ſuperior Court is not bounded by the other, and therefore will not ſend the Records on the *Certiorari* for any other Court but the *Chancery*, which commands the Tenor of them, but not the Record itſelf, and the *Certifying* ſuch Tenor, does not hinder the Court where they are, from proceeding on them; and this Contrivance was to communicate the Record from one Court to another, without the actual removing the Records themſelves.

In Writs of Error, the Record itſelf is ſent, and then the *King's-Bench* cannot ſend a *Certiorari* to know whether there was an Original, or Warrant of Attorney 37 H. 6. 16. F. New. N. B. 45.

to give them Authority to hold ſuch Plea; and on this *Certiorari*, the Tenor of the Original, *&c.* is ſent, and not the Original.

It ſeems, that anciently, the Juſtices in *Eyre*, and Judges of *Aſſize*, as alſo of the *King's-Bench*, and *Common Pleas*, ſent their Records into the Receipt of the *Exchequer*, where was the Repoſitory of the Records of the whole Kingdom, and this was, that the *Exchequer* might iſſue out Proceſs for the Fines and Amerciaments; but after the 9 *H.* 4. it was found more convenient, that every Court ſhould have the keeping its own Records, for then the Buſineſs of the King's Court had multiplied ſo much, that there could not be one common Repoſitory of all the Records; and then all the Courts only make Extracts of the Fines, and Amerciaments that were in the Records; and this was purſuant to the Method of Intercourſe between the *Chancery* and *Exchequer*; before, the Offices under which the King was intitled, were under the great Seal, and this was out of the Court of *Chancery*, and Extracts of theſe were ſent into the *Exchequer*; ſo when the other Courts ceaſed to make the *Exchequer* the common Repoſitory for the Records, as they ſeemed to do about 9 *H.* 4. when they were ſettled in their proper Juriſdiction, then

then they ceaſed to ſend the Records themſelves into the *Exchequer*, as into one common Repoſitory; but then they made Extracts of their Fines and Amerciaments, in order that the *Exchequer*, might make Proceſs only for the Fines and Amerciaments.

But it is to be noted, that when the Records themſelves were ſent into the *Exchequer*, the *Exchequer* made Proceſs only for the Fines and Amerciaments belonging to the King; therefore the Records of Judges of *Aſſize*, or in *Eyre*, were removed by *Certiorari* and *Mittimus* into the *King's-Bench*, or *Common Pleas*, in order to have Execution upon them.

The Writs of *Certiorari* to remove Records out of one Court, into another, are of ſeveral Forms, and the Form of the Writ to remove the Record of Redisſeiſin is ſuch.

De Recordo & Proceſſu Inquiſitionis Rediſſeiſinæ coram Rege mittendis. Reg. 209.

Rex, Vicecomiti Lincoln *ſalutem, quia quibuſdam certis de cauſis certiorari volumus, ſuper recordo & proceſſu cujuſdam inquiſitionis factæ coram te et cuſtodibus placitorum coronæ noſtræ in com. tuo apud* B. *per breve noſtrum, ſuper quadam rediſſeiſ.* I. *per* A. *facta ut dicitur, de uno meſſuagio cum pertinentiis in* N. *Tibi præcipimus quod ſi judicium inde redditum ſit, tunc recordum et proceſſum prædicta cum omnibus*

ea tangentibus, nobis ſub ſigillo tuo diſtincte & aperte mittas et hoc breve; ita, &c. ubicunque, &c. ut inſpectis recordo & proceſſu prædictis, ulterius inde fieri faciamus quod de jure & ſecundum legem & conſuetudinem regni noſtri Angliæ *fuerit faciendum*, T. *&c.*

Of the Record and Proceſs of an Inquiſition of Rediſſeiſin to be ſent to the King.

'THE King to the Sheriff of *Lincoln*, 'Greeting. Inaſmuch as we are deſirous for ſome certain Cauſes, to be certified of the Record and Proceſs of a certain Inquiſition made before you and the Keepers of the Pleas of our Crown, in your County at *B.* by our Writ, of a certain Rediſſeiſin of *I.* made by *A.* as is ſaid, of one Meſſuage with the Appurtenances in *N.* We command you that if Judgment be given therein, that you then ſend us the Record and Proceſs aforeſaid, with every Thing concerning them, and this Writ diſtinctly and openly under your Seal; ſo that, *&c.* wherever, *&c.* that having inſpected the Record and Proceſs aforeſaid, we may cauſe further to be done therein, as ought of Right, and according to the Law and Cuſtom of our Kingdom of *England* to be done, Witneſs, *&c.*

WHEN the Tenor of the Record is ſufficient, and when the Record itſelf is to be removed; if one brings Debt upon

a Recovery in an inferior Court, as in that of *Pipowders*, there the Party need not have the Record itſelf, but the Tenor of the Record; ſo if one brings Debt in *Common Bench*, upon Damage recovered in *K. B.* or in the Court of *Norwich*; but if * *Nul tiel Record* be pleaded there, it ſufficeth if the Tenor of the Record be removed into *Chancery* by *Certiorari*, and from thence tranſmitted hither by *Mittimus*, 7 *H.* 6. 19. *See* 19 *H.* 6. 79. 80. accordingly *Dyer* 187; for when the Action is grounded on a Record, if it be not denied, you have no occaſion to prove it, and if it be denied by * *Nul tiel Record*, it is ſufficient to produce it by *Certiorari & Mittimus*, † *ſub Pede Sigilli.*

SECONDLY, where one is to ſue Execution of a Record in another Court, as if one be to ſue Execution in the *Common Bench*, upon a Recovery in *Ancient Demeſne*, or before the Juſtices of *Aſſize*, or of *Oyer and Terminer*; there the Record itſelf ought to be removed into *Chancery* by *Certiorari*, and the Record with the *Certiorari* tranſmitted to the *Common Bench* by *Mittimus*; ſo if an Attaint is to be ſued upon ſuch Recovery, 34 *H.* 6. 251. the Reaſon is, that when Execution is ſued out, it muſt always come from the

* *No ſuch Record.* † *Under Seal.*

Record itſelf, and therefore the *Certiorari* in this Caſe muſt remove the Record, and not the Tenor only, and it ſeems that the *Certiorari* may be out of the ſuperior Court, as from *Chancery*; but there is this Difference, that where the Action is brought in an inferior Court, which may be brought in a ſuperior, there they ſhall not by *Certiorari* bring it up in order to have it executed, becauſe the Force of the firſt Judgment ſhall not be extended farther than the Import of that Judgment when it was given; but where a Judgment of an inferior Court is brought up by Writ of Error, and Judgment is affirmed, there Execution ſhall be univerſal, becauſe it is of their own Judgment; *Hutton* 117. But where the Action could not be commenced any where elſe but in the inferior Court, there they will grant Execution univerſally, becauſe there would be otherwiſe a Failure of Juſtice, for Perſons would commit Diſſeiſin within ſuch particular Diſtricts in which only they muſt be impleaded; where they had not ſufficient to anſwer Damages; it ſeems there can be no Execution on the Tenor of a Record, becauſe the Execution muſt be of the Judgment itſelf, and the Judgment remains, though the Tenor be tranſ-

tranſmitted; but in the Caſe of *H.* 6. where the Judgment of the *Common Pleas* was tranſmitted into the *Exchequer*, there they gave Judgment in the ſame Court on the * *Tenorem Tenoris*; becauſe it was a Judgment out of the Record, which ſhould have been in the *C. B.* but this will not warrant the iſſuing Execution out of a Tenor, where the Record is remaining in another Court; but where Execution is to be ſued in the *Common Bench*, out of a Record which remains in the Treaſury, as of a Fine, Recovery, *&c.* (*Note*, all theſe Records were removed in the Receipt of the *Exchequer* about the 9 *of H.* 4. 37 *H.* 6. 16.) but there they ſhall not ſend the Record itſelf from the Chamberlains, and Treaſuerer, but the *Mittimus* ſhall be of the Tenor of the Record only; *ſee* the Cauſe 39 *H.* 6. 4. by *Priſot*; becauſe a Record of the Court of *Common Pleas*, upon which no other Court could award Execution; but where the Tenor of a Record is *certified* into *Chancery*, as on a Partition between Parceners, Recognizance, *&c.* tranſmitted by *Mittimus*, executed in the *Common Bench*, the Court will not grant Execution on ſuch Tenor, becauſe then the Execution might be double, *Dyer.* 136. and if the Tenor of the Record be in

17 H. 6. 17. 28. 24 E. 3. 7. 9. Dy. 217.

* *Tenor of the Tenor.*

Chancery, before *Certiorari* filed there, they will not ſend the *Certiorari* to the Receipt, nor ſend the ſame Tenor which is there filed, but * *Tenorem Tenoris*, and it ſeems that this is ſufficient 17 *H.* 6. 17. 28. 24 *Ed.* 3. 79. no Execution out of the Tenor of the Record, *Dyer.* 217. no *Scire facias* upon the Tranſcript of a Record ſent out of *Chancery* into the *Common Bench*, *Dyer.* 228. 5 *H.* 7. 25. where the Record is pleaded in the ſame Court, it ought not to be entered (if † *Nul tiel Record* be pleaded) ‡ *quod habeat hic Recordum ſub ſuo Periculo*, but in ſuch Form, ‖ *Et quia Juſticiarii hic adviſari volunt ſuper inſpectionem vel examinationem Recordi, &c. Dies datus eſt partibus*; ſee note 31 *H.* 6. 51. 39 *H.* 6. 3. 32 *Ed.* 3. *quare Impedit.* where † *Nul tiel Record* is pleaded, *ſee* 7 *H.* 6. 30.

Note, the Court of *Common Bench* cannot direct a *Certiorari* to the Judges of *Aſſize*, nor to the Chamberlain § *de Scaccario*, but they ought to ſue the *Certiorari* out of the *Chancery*, and thence ſend the Record into the *Common Bench* by *Mittimus*, but the *Common Bench* may direct a *Certiorari* to the Juſtices of Peace;

K. B.

* *Tenor of the Tenor.* † *No ſuch Record.*

‡ *That he have here the Record at his Peril.*

‖ *And becauſe the Juſtices here are deſirous of conſidering upon Inſpection, or Examination of the Record, &c. Day is given to the Parties.*

§ *Of the Exchequer.*

K. B. cannot ſend a *Certiorari* upon Suggeſtion, where nothing is before them, but the *Chancery* may 41 *Aſſ.* 22.

WHERE the Courts are of equal Juriſdiction, they cannot write to each other to *certify* their Records; and *note* anciently, that no other Court, but the *Chancery* granted any *Certiorari* on a Suggeſtion, where there was nothing before them; but now ſince the ſuperior Courts are to keep the inferior within Bounds, they grant a *Certiorari*, though there be nothing before them, and one may remove a *poſt* Diſſeiſin, *&c.* by *Certiorari*, and if a Man be admitted in a Rediſſeiſin, or *poſt* Diſſeiſin, and hath no Lands within the County to put in Execution, he may remove the Record by a *Certiorari* into the *King's-Bench*, and there have Execution, and he may remove a Recovery in an *Aſſize* of *novel Diſſeiſin* into the *King's-Bench* by a *Certiorari* in like manner, but the Writ of *Certiorari* ſaith, * *Si Judicium inde redditum ſit, tunc Record. Proceſſ. &c.* as above, by which it appeareth, that it ought to appear that the Judgment be given in the *Aſſize*, *&c.* otherwiſe it ſeemeth he ſhall not have the Writ; for the *Certiorari* is ſaid to remove the Record, to the Intent he ſue forth the Exe-

* *If Judgment be thereof given, then the Record, Proceſs, &c.*

Execution upon the ſame when it is removed into the *King's-Bench*, for there they may award Execution into every County to execute the ſame.

THE *Aſſize* cannot be commenced in the *King's-Bench*, or *Common Pleas* unleſs it be of Land in the ſame County where they ſit, and therefore this Action being to be commenced in the Court below, and not in the King's Courts above, it may be removed in order to extend the Execution, and for the ſame Reaſon may remove a Rediſſeiſen, or *poſt* Diſſeiſin after Judgment, becauſe he is obliged to bring it before the Sheriff according to the Statute.

SEE a Recovery in *Ancient Demeſne* 39 *H.* 6. 3. & 4. but *ſee* 44 *E.* 3. 28. 36 *H.* 8. *Bro. Certiorari* 20. There is no Writ of *Certiorari* to remove the Record in the *Common Bench* immediately, but firſt in the *Chancery*, yet 43 *Aſſ.* 20. *the Contrary* is admitted. *Note*, the Diſtinction is ſettled, that any of the King's Courts may remove a Record from an inferior Court by *Certiorari* into their own Court immediately.

IF a Man do recover Lands by Aſſize of *Novel Diſſeiſin*, and the Defendant will ſue a *Certificate* before other Juſtices, there he ought to ſue forth a *Certiorari* to the Juſtices of *Aſſize*, to *certify* the

Record unto the new Juſtices, who hold Plea upon the *Certificate*, for the Commiſſion of the firſt Aſſizes being determined, the ſecond Aſſizes have not Power to proceed on the Record till it is ſent before them by *Certiorari*, and the Words of * *ſine Dilatione* ſhall not be put in any Writ which hath a certain Day of Return; and if a Man recover *per Aſſize de novel Diſſeiſin*, and the Defendant will ſue an Attaint before other Juſtices, then he ought to have a *Certiorari* to the Juſtices of *Aſſize* to *certify* the Record † *ſi Judicium redditum ſit cauſâ qua ſupra.*

And if a Man recover before Juſtices in *Eyre* in an *Aſſize* of *novel Diſſeiſin*, the other Party may ſue forth an Attaint before other Juſtices, and have a *Certiorari* to the Juſtices in *Eyre*, to ſend the other Record before the other Juſtices.

And the King may ſend his Writ of *Certiorari* to the Barons, Treaſurer, and Chamberlains of the *Exchequer*, to *certify* the Record of *Aſſize* in the Treaſury in their Cuſtody, into the *King's-Bench*, and this in order that the Party may have Execution thereon. 37 H. 6. 16.

There is another Writ of *Certiorari* to the Treaſurer, and Chamberlains of the 9 E. 4. 50. 24 E. 3. 24. 15 E. 3. 5. 8 E. 4. 25. 26.

* *Without Delay.*

† *If Judgment be given for the Reaſon above.*

the *Exchequer*, to *certify* the Record of the *Aſſize* taken, but the Judgment was not given, becauſe the Defendant died; but the Writ is of little Effect, for that by the Death of the Defendant before Judgment, the Writ is abated.

And if a Man will ſue an Attaint upon a Recovery in an *Aſſize*, which Record of *Aſſize* is in the Treaſury, then he who bringeth the Attaint ought to ſue a *Certiorari* to the Treaſurer, and Chamberlains of the *Exchequer*, to *certify* the Record of *Aſſize* before the Juſtices, before the Attaint be ſued forth; for it is neceſſary to have the Record before them on which the Attaint is grounded.

Note, here there ought to be the Record itſelf, and not the Tenor only, 39 *H.* 6. 4. for the Record muſt be anulled if the Jury be attainted.

If a Man do recover Damages in an *Aſſize* of *novel Diſſeiſin*, and before he hath Execution of the Damages, the Record is ſent into the Treaſury; then he may ſue a *Certiorari* to the Treaſurer, and Chamberlains, to *certify* the Record of Recovery in the *Aſſize* before the King, that Execution may be awarded for the Damages; by this it appears, that the Juſtices of *Aſſize* not being ſtanding Commiſſioners, were won't to ſend the

Aſſizes

Aſſizes into the *Exchequer*, long after the others ceaſed to ſend theirs, and if the *Aſſizes* were ſent into the Treaſury before Execution, there was a Method to get Execution by *Certiorari* and *Mittimus*.

And if a Man recover Lands, and Damages in an *Aſſize* of freſh Force, and the Defendant hath not any Thing within the City or Borough, to ſatisfy the Damages; then the Party may ſue a *Certiorari* to the Mayor or Bailiffs to *certify* the Record into the *King's-Bench*, that he may have Execution of the Damages recovered. If the King maketh certain Perſons Juſtices of *Aſſize*, *&c.* in one County, and afterwards at another *Aſſize*, he maketh other Juſtices of the ſame County, a general *Certiorari* ſhall be ſued to the firſt Juſtices to *certify* the Records of *Aſſize*, and Juries which were taken in that County before the new Juſtices; by this *Certiorari* they have all the Records before them, but they have not Authority to proceed upon them.

When an *Aſſize* is removed into the *King's-Bench* by *Certiorari* they have an Authority to proceed on it immediately, becauſe there would be a Failure of Juſtice if they ſhould not proceed upon it; but where Juſtices of *Aſſize* were appointed, and they take *Aſſizes*, and then a new Com-

Commiſſion paſſes, the new Juſtices cannot proceed on that *Aſſize*, for their Commiſſions cannot extend thereto, unleſs they have a Writ to that Purpoſe; but on this Writ, though there be an *Alias*, and *Pluries*, with a * *vel Cauſam nobis ſignifices*; yet if they will not do any thing, it is doubted whether he ſhall have an Attachment; for the Judge is not puniſhable unleſs the Delay proceedeth from Corruption.

And therefore in *Aſſize* of *novel Diſſeiſin*, if the Verdict paſs for the Plaintiff, and before Judgment is given a new Commiſſion is to other Juſtices of the ſame County, the Party for whom the Verdict paſſed, may ſue forth a *Certiorari* to the firſt Juſtices to remove the Record into the *King's-Bench*, to have Judgment given upon that *Aſſize*, and Verdict paſſed; or may ſue a *Certiorari* to the firſt Juſtices, to ſend the Record before the new Juſtices; that they may give Judgment thereupon; and it behoveth to have another Writ unto the new Juſtices to receive the Record, and that they proceed to Judgment, and when the Record is removed after Verdict given before other Juſtices; and they delay to proceed to Judgment upon the Verdict, the Party for

* *Or ſignify the Cauſe to us.*

for whom the Judgment ſhould be given, may ſue forth a Writ directed to them, **quod receptis & viſis Record. & Proceſſ. præd.* they proceed to judge, *&c.* and thereupon the Party may have an *Alias*, and a *Pluries*, † *vel Cauſam nobis ſignifices*; and if they will do any thing, whether he ſhall have an Attachment is a Queſtion; for there is a Statute made 3*d Ed.* 3. *cap.* 1. which willeth that Commiſſioners, in ſpecial Caſes limited by the Statute, ſhall be puniſhed for their Miſ-doings, *viz.* for taking Bail where they ſhould not, but it ſeemeth they ſhall not be puniſhed but for ſuch Cauſe as is mentioned in the Statute; and *Ann.* 27 *E.* 3. in *Aſſize* a Juſtice was indicted, for that he cauſed an Indictment which was found to be but Treſpaſs, to be entered on Record as Felony, *&c.* and the ſame was adjudged a void Indictment; becauſe it was to make void a Record; but yet it ſeemeth he might be indicted for taking of Money, or for other Falſity which doth deſtroy and defeat the Record. *Quere.*

And a Man may have a Writ to the ſame Juſtices before whom the Verdict paſſed, *&c.* to proceed to Judgment, as well as he ſhall have a Writ to other Juſtices,

* *That the Record and Proceſs being received and ſeen by us.*
† *Or ſignify to us the Cauſe.*

Juſtices before whom the Record is removed. *Note*, if the Juſtices of *Niſi prius* die before the Day in Bank, after the Verdict taken, the Court may receive the Records by the Hands of the Clerk of *Aſſize*, without any *Certiorari* to the Executors of the Juſtices, and the Entry ſhall be general; * *ad quem Diem hic venerunt Partes, & Juſtic. ad Aſſizas coram quibus, &c. miſerunt hic Recordum ſcriptum in hæc Verba, &c.* and admitting that it ſhould be Error, yet he ſhall not be received to aſſign it for Error; for it is contrary to what the Court did as Judge; and though in ſome Caſes the Court ſhall give Faith to an Act done by a dead Judge, as the 2 *H.* 7. a Warrant of Attorney received by a Judge in *Pais* who is dead, *Dy.* 163. But *Note*, if a Juſtice of *Niſi prius* be removed, the *Certiorari* ſhall iſſue to him, and if he die, and the Executors have the Record, a *Certiorari* ſhall go to them. 13 *H.* 7. 21 *Dyer* 439.

If a Man in an *Aſſize* of *novel Deſſeiſin*, or other Action real, before Juſtices in *Eyre*, vouch one to Warranty, who preſently enters into Warranty, and afterwards

* *At which Day the Parties came here, and the Juſtices of Aſſize before whom, &c. ſent here the Record wrote in theſe Words.*

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wards loſeth; the Plaintiff ſhall recover, and the Tenant ſhall have Judgment to recover in Value againſt the Voucher; now, if he who recovered in Value, will have Execution, he ought to ſue a *Certiorari* to the Treaſurer and Chamberlains of the *Exchequer*, to certify the Record in Aſſize into the *Chancery*; and when it is there *certified*, the King ſhall ſend the Record by *Mittimus* into the *Common Pleas*, and thereupon the Juſtices ſhall award a *Scire facias* againſt the Party, againſt whom the Recovery was, to come and ſhew Cauſe why Execution ſhould not be done of the Lands in Value.

Note, A *Scire facias* lies upon the Tenor, before any Entry of it upon the Roll: And if the Tranſcript of a Fine comes in by *Mittimus*, at the Suit of one, and another hath Cauſe of Execution upon the ſame Fine, he ought to purſue the *Mittimus* to have Execution, otherwiſe he ſhall not have it, tho' the Tranſcript be entered upon the Roll before; 11 *H.* 6. 44. The Reaſon is, that when the Records were anciently removed into the Treaſury, and the Court of *Chancery* ſent them their own Records, they were obliged to execute that which was their own Judgment, or final Award, otherwiſe they did not obey the King's Writ,

which was a *Mittimus* for that Purpoſe; but they were not obliged on ſuch *Mittimus* to execute the Judgment of an inferior Court, becauſe the Judgment lay in that Court to be executed; and if the *Chancery* had a mind they ſhould execute the Judgment more extenſively, they ſhould ſend them the Records on which Execution ſhould iſſue; for the Judgment of their own Court they are obliged to execute by Law, but the Judgment of another, they are not obliged to execute till they have it before them; but when the *Chancery* only ſends them the Tenor, they execute it no farther than the Writ commands them, and therefore a Stranger can't have Execution in ſuch Caſe, becauſe it is but the Tenor of a Record, and on ſuch Tenor they can't iſſue Execution, but by the ſpecial Command of the King.

AND a Man may ſue a *Certiorari* directed to the Juſtices of *Aſſize*, to remove the Records of *Aſſize* into the *Chancery*, and alſo a Deed which is before them, and afterwards he may ſue for the Writ of *Mittimus* unto the new Juſtices of *Aſſize* of thoſe Records, and of the Deed which remained before the other Juſtices.

AND

And if the Huſband and Wife ſue a Bond (which is made to the Wife) in the *Common Pleas*, and the Deed is there denied, for that it remains in the keeping of the *Cuſtos Brevium*, and the Huſband dieth; the Wife may have a Writ out of the *Chancery*, directed to the *Cuſtos Brevium* in the *Common Pleas*, that he deliver the Deed to the Wife, becauſe the Plea is determined by the Death of the Huſband; and it appears, ſhe is intitled to ſuch Deed.

And when Juſtices in *Eyre* come, and ſhall be in any County by the King's Commiſſion, then a Writ ſhall be ſent to the Juſtices of the *Common Pleas*, to adjourn all the Pleas of that County, which are in the *Common Pleas*, before the Juſtice in *Eyre*, to be determined before them; and if the Juſtices in *Eyre* can't determine the Pleas before they depart out of the County, then a Writ ſhall be ſent to the Juſtices in *Eyre*, to ſend thoſe Records and Pleas which are not determined nor adjudged, into the *Common Pleas* again, and the Writ ſhall be ſuch:

Quod recordum & proceſſus per juſticiarios de Banco miſſa juſticiariis itinerantibus, remittantur juſticiariis de Banco, eo quod placitum remanſerit non terminatum in itinere. Reg. 215.

Rex dilecto & fideli ſuo G. *ſalutem cum loquela quæ fuit coram juſticiariis noſtris de banco, per breve noſtrum inter* S. *petentem &* I. *tenentem, de uno meſſuagio cum pertin. in* T. *in com.* N. *una cum brevi præ-*

dicto coram vobis & ſociis veſtris nuper juſticiariis noſtris itinerantibus in com. prædicto miſſa fuiſſet placitanda, ac placitum illud quibuſdam certis de cauſis in itinere prædicto remanſerit indiſcuſſum, abſque hoc quod idem placitum alicubi adjornatum fuiſſet placitandum, per quod ex parte ipſius S. *nobis eſt ſupplicatum, ut ſibi præmiſſis juſtitiam facere velimus: Nos eâ de causa attendentes, expediens fore quod juſticiarii noſtri de banco ſuper recordo & proceſſu loquelæ prædictæ coram vobis & præfatis ſociis veſtris in itinere prædicto habitis certiorentur, vobis mandamus quod recordum & proceſſum prædicta una cum brevi prædicto una cum brevi prædicta & omnibus aliis ea tangentibus, præfatis juſticiariis noſtris de banco ſub ſigillo veſtro diſtincte & aperte ſine dilatione mittatis & hoc breve, ut his inſpectis ulterius procedere valeant in loquelâ prædictâ ſecundum legem,* T. *&c.*

That the Record and Proceſs ſent by the Juſtices of the *Bench* to the Juſtices in *Eyre*, be ſent back to the Juſtices of the *Bench*, becauſe the Plea had remained undetermined in *Eyre*.

'The King, To his beloved and faithful G. Greeting. Whereas the Plaint which was before our Juſtices of the Bench by our Writ, between *S.* Demandant, and *I.* Tenant, of one Meſſuage with the Appurtenances in *T.* in the County of *N.* together with the Writ aforeſaid, before you and your Compa-

'nions,

'nions, late our Juſtices in *Eyre*, in the 'County aforeſaid, was ſent to be tried; 'and that Plea, for ſome certain Cauſes, 'remained undetermined in the aforeſaid 'Circuit, without that, that the ſame Plea 'was adjourned to be tried at ſome other 'Place, wherefore, on behalf of *S.* we 'have been beſought to do him juſtice in 'the Premiſſes: We therefore taking it 'into conſideration, think it expedient, 'that our Juſtices of the Bench do certi-'fy the Record and Proceſs of the afore-'ſaid Plaint, had before you and your 'aforeſaid Companions in the aforeſaid 'Circuit. We command you, that you 'diſtinctly and openly without delay 'ſend the Record and Proceſs of the 'aforeſaid Plaint, with the aforeſaid 'Writ, and all others concerning them, 'and this Writ, to our aforeſaid Juſtices 'of the Bench, under your Seal, that 'having inſpected them, they may be 'enabled to proceed further in the Plaint 'aforeſaid, according to Law. Wit-'neſs, *&c.*

THE Juſtices Itinerant have a ſuperior Commiſſion for the *Aſſizes* in the County where they come, as being the ſovereign Juriſdiction for that purpoſe, and therefore all *Aſſizes* are adjourned by *Certiorari* before.

AND if an *Aſſize* of *novel Diſſeiſin* be brought in the *King's-Bench*, and the Defendant alledge and plead, that there is a Writ of an higher Nature depending in the *Common Pleas* for the ſame Land, between the Plaintiff and Defendant; then if they be at iſſue, whether there be ſuch a Writ depending or not; the Defendant ought to ſue a *Certiorari* out of the *Chancery* to the Juſtices of the *Common Pleas*, to remove and *certify* the Record into the *Chancery*; and upon the ſame *certified*, he ſhall have a Writ of *Mittimus* out of the *Chancery*, to the Juſtices of the *King's Bench*; with which Writ, the King ſhall ſend the Tenor of the Record which is there, into the *King's-Bench*, and the Writ of *Mittimus* ſhall be ſuch.

De Recordo & Proceſſu mittendis in *Cancellariam*, eo quod allegatus placitando in Aſſiſâ, quod breve de altiori Naturâ pendet inter Partes. Reg. 215.

Rex dilectis & fidelibus, &c. W. *de* H. *ſalutem. Cum* R. *de* P. *&* P. *uxor ejus nuper arrainaverint quandam aſſiſam novæ diſſeiſinæ coram vobis apud* W. *per breve noſtrum verſus* A *de* B. *&* Johannam *uxorem ejus de tenementis in* A. *et duo meſſuagia, & tres carucatas terræ, viginti acras prati, & quinque marcatas reditus cum pertinentiis in eâdem villâ in viſu poſuiſſent, iidemque* A. *&* J. *placitando in aſſiſâ allegaſſent, quod breve de altiori natura tunc*

diu

diu ante pendebat inter partes prædictas, coram vobis & ſociis veſtris juſtitiariis noſtris de banco, de meſſuagiis, terrâ, prato, & reditu prædictis, & recordum & proceſſum inde coram vobis & ſociis veſtris habita vocaſſent ad warrantum, ſicut ex parte ipſorum A. & J. *nobis intelligi datur: nos igitur attendentes expediens eſſe & neceſſe, quod dilecti, &c. ad placita coram nobis tenenda aſſignatis, ſuper tenore recordi & proceſſus prædictorum coram vobis ut prædictum eſt habitorum certionentur, vobis mandamus quod tenorem recordi & proceſſus prædictorum coram vobis ut prædictum eſt habitorum cum omnibus tenorem illum tangentibus, nobis in* cancellariâ *noſtrâ ſub ſigillo veſtro diſtincte & aperte ſine dilatione mittatis & hoc breve,* T. *&c.*

Of a Record and Proceſs to be ſent into *Chancery*, it being alledged by Plea in Aſſize that a Writ of an higher Nature is depending between the Parties.

'The King to his beloved and faith-
'ful, *&c. W.* of *H.* Greeting. Whereas
'*R.* of *P.* and *P.* his Wife lately brought
'a certain Aſſize of *novel Diſſeiſin*, be-
'fore you at *W.* by our Writ againſt *A.*
'of *B.* and *Johanna* his Wife, of Tene-
'ments in *A.* and two Meſſuages and
'three Carves of Land, twenty Acres of
'Meadow, and five Marks of Rent,
'with the Appurtenances in the ſame
'City, had put in View, and the ſame
'*A.* and *I.* had alledged by pleading an

'Aſſize, that a Writ of an higher Na-
'ture, then long before, was depending
'between the Parties aforeſaid, before
'you and your Companions, our Juſtices
'of the Bench, of the Meſſuages, Land,
'Meadow, and Rents aforeſaid, and had
'demanded Warranty of the Record and
'Proceſs, before you and your Com-
'panions thereupon taken, as on Behalf
'of *A.* and *I.* it is given us to under-
'ſtand: We therefore finding it expe-
'dient and neceſſary, that our beloved,
'*&c.* *aſſigned to hold Pleas before us,
'ſhould certify the Tenor of the Record
'and Proceſs aforeſaid, had before you
'as aforeſaid, command you that you
'diſtinctly, and openly, without delay,
'ſend the Tenor of the Record and Pro-
'ceſs aforeſaid, had before you as afore-
'ſaid, with all that concern the Tenor,
'and this Writ to us in our *Chancery*,
'under your Seal, Witneſs, *&c.*

See a *Certiorari* out of *B. R*, to remove the Foot of the Record of a Fine levied in *Common Pleas*, and † *non allocatur*; but a *Certiorari* ought to iſſue out of *Chancery* for the Tenor, and it ſhall be ſent into *K. B.* by *Mittimus*; for the Record of the Fine with the *Cuſtos Brevium*, though

Dy. 275.

* *Judges of the King's-Bench.* † *Not allowed.*

though it be not the laſt Record, is the Fine from whence the Chyrographer makes the Indentures; yet it is a Record in the *Cuſtos Brevium's* Office, and an entire Record of the Court they will not ſend up, but in obedience to the King's original Writ; for this is not like to the Caſe where Diminution is alledged, for there the Court of *Common Pleas* only *certify*, whether there be ſuch an Original between the Parties or not, and ſo of the Warrant of Attorney; but the *Certiorari* in this Cauſe, was to ſend the thing itſelf, which they never part with at all, nor ſo much as the Tenor of it to any other Court, but to the Command of the King in *Chancery*, for in their judicial Capacities, one Court cannot command another; but the *Chancery* was the Center from which the Records of the ſuperior Court were to be commanded from the one, to the other, by the original Conſtitution.

HERE we muſt take notice, that where the ſuperior Court cannot grant the ſame Execution, as in Judgment, there the Writ of Error in *Chancery* ſends for the Record itſelf; but where the ſuperior Court cannot give Execution, as in Fines, there they ſend only for the Tranſcript of the Record, and to ſend that Tranſcript

ſcript into the *King's Bench*; and not by *Mittimus* from the Court of *Chancery*; and there the Reaſon why the Tranſcript is ſent is, that theſe Concords, are the Evidences of Mens Inheritances, which are therefore kept together in that Court, that all Perſons may ſearch for them there, and the Reaſon why it is ſent into the *King's Bench* immediately, and not by the Way of *Chancery* is, that the Record is not denied, but admitted by both Sides, and therefore the Tranſcript may be ſent in immediately, and not go round by the *Chancery* to be authenticated * *ſub Pede Sigilli.*

If in a ſuperior Court, they plead a Recovery, or declare on it in an inferior Court, the Superior will ſend a *Certiorari*, on * *Nul tiel Record* pleaded, and upon it they may *certify* the Record itſelf; if under the Seal of the inferior Court they plead a Recovery in the inferior Court, on *Nul tiel Record*, they muſt have a *Certiorari* from the *Chancery*, and remove it † *ſub Pede Sigilli.*

And if a Man do recover Damages and Coſts, in an *Aſſize* of *novel Diſſeſin*, before Juſtices of *Aſſize* in the County, and before Execution ſued of the Damages, the Record is removed into the *Chancery*

* *No ſuch Record.* † *Under Seal.*

cery by *Certiorari*, he who recovereth in the *Aſſize*, may ſue forth a Writ of *Mittimus* to ſend the Record into the *King's-Bench*, commanding them to proceed and to award Execution.

Coram Rege ad executionem faciendam de Damnis adjudicatis in Aſſiſis. Reg. 215. b.

Rex dilectis, G. *&c. & ſociis ſuis, &c. tenend' aſſign. ſalutem. Cum* I. *per recognitionem as, no. diſſ. quam arrainavit coram* W. *de* O. *& ſociis ſuis nuper juſticiariis domini* Edwardi *nuper regis* Angliæ *avi noſtri ad aſſiſas, &c. aſſignatis, verſus* R. *& alios, &c. de tenementis in* T. *recuperaſſet ſeiſinam ſuam de uno meſuagio cum pertinentiis in* B. *per conſiderationem curiæ prædictæ, & damna ſua quæ ad decem libras taxabantur, ſicut per recordum & proceſſum aſſiſæ prædictæ quæ coram nobis certis de cauſis venire fecimus, plenius apparet, ac executio judicii quo ad damna recuperanda adhuc reſtat facienda, ſicut ex parte ipſius* I. *nobis datur intelligi. Nos igitur volentes dictum judicium executioni debitæ demandari, recordum et proceſſum prædicta vobis mittimus ſub pede ſigilli noſtri, mandantes quod viſis recordo et proceſſu predictis, ulterius quoad executionem judicii prædicti fieri facias quod de jure, &c,* ut ſupra.

The

Mittimus before the King to do Execution for Damages adjudged in Aſſize.

'THE King, *&c.* to his beloved *G.* '*&c.* and his Companions, aſſigned to 'hold, *&c.* Greeting. Whereas *I.* by 'his Recognition of Aſſize of *novel Diſ-* '*ſeiſin*, which he brought before *W.* of '*O.* and his Companions late Juſtices of 'Lord *Edward*, late King of *England*, 'our Grandfather, aſſigned the Aſſizes, '*&c.* againſt *R.* and others, *&c.* of Te-'nements in *T.* had recovered his Seiſin 'of one Meſſuage with the Appurte-'nances, in *B.* by Conſideration of the 'Court aforeſaid, and his Damages which 'were taxed at ten Pounds, as by the 'Record and Proceſs of the Aſſize afore-'ſaid, which we have cauſed to come be-'fore us for certain Cauſes, more fully 'appears; and Execution of the Judg-'ment as to the Coſts recovered ſtill re-'mains to be done, as on Behalf of *I.* 'we are given to underſtand: We there-'fore willing that the aforeſaid Judg-'ment ſhould have due Execution, ſend 'you the Record and Proceſs aforeſaid, 'under our Seal, commanding you that 'having ſeen the Record and Proceſs 'aforeſaid, you cauſe further to be done 'as to the Execution of the Judgment 'aforeſaid, what of Right, *&c.* as be-'fore."

Note,

Note, the *Mittimus* here is * *ſub Pede ſigilli*, becauſe the Record itſelf is immediately *certified* into *Chancery*; for it cannot be immediately *certified* into the *King's Bench*, unleſs they were to proceed upon it to examine Errors; for then the *Chancery*, by the Writ of Error, would have ſent it immediately, becauſe they have immediate Juriſdiction to correct the Errors of other Courts; but where the *Certiorari* is to have Execution, there the Record is immediately ſent into the Court of *Chancery*; and becauſe the *Chancery* can't iſſue Execution, not having judicial Power, therefore they ſend it by *Mittimus* * *ſub Pede ſigilli*, that there might be no Failure of Juſtice, in not having the Judgment in *Aſſize* executed through the whole kingdom, and the *Chancellor* may deliver it with his own Hands into the *King's Bench*, and this ſhall be tantamount to a *Mittimus*, 5 *H.* 5. 1. *Bro. Abr. Tit. cauſe de remov. Plea*, &c. 15.

And if a Man recover Lands by *Aſſize* of *Novel Deſſeiſin*, before Juſtices of *Aſſize*, and the Defendant hath a Writ of *Warrantia Chartæ* depending in the *Common Pleas*, the Party may ſue a *Certiorari* to remove the Record of the *Aſſize* into *Chancery*, and thereupon have a *Mittimus*

* *Under Seal.*

mus of the Record of *Aſſize* to the Juſtices of the *Common Pleas*, and in the end of the Writ ſhall be ſaid, * *Ut iis inſpectis ſecurius procedere valeant in placito Warrantiæ præd. ſecundum*, &c. *legem*, &c. by ſuch *Aſſize* tranſmitted, it appears, that the Plaintiff in *Aſſize*, who is Defendant in the *Warrantia Chartæ*, has proceeded contrary to his Warranty.

And in an *Aſſize of Novel Deſſeiſin*, if the Defendant pleads two or three Recoveries in *Aſſize* before other Juſtices, which Record is in the Treaſury, &c. Now, if the Record be denied, for which he ſueth a *Certiorari* to the Treaſurer and Chamberlains of the *Exchequer*, to *certify* the Record at a certain Day into the *Chancery*; if they at the Day *certify* any Records, but do not *certify* that there are other Rolls of the ſame Juſtices remaining in the Treaſury in the Tower of *London*, ſo as that they have not made a full Search of the Record; then the King ſhall ſend to the Juſtices of *Aſſize* his Writ, reciting the Matter, commanding them to continue that *Aſſize* till another Day, ſo as the Defendant be not damnified by failing of the Record; and the ſame ſeemeth to be reaſonable.

And

* *That having inſpected them, they might proceed with more certainty in the aforeſaid Plea of Warranty, according to, &c. the Law, &c.*

AND if a Man be bound in a Statute-Staple, to pay a certain Sum of Money at a Day certain; after the Day, the Party who hath the Statute, may come to the Mayor of the Staple, and ſhew him the ſame, and pray him to *certify* the ſame into *Chancery*; and if the Mayor will not do it, then the Party who hath the Obligation, may come into the *Chancery*, and ſhew the ſame there, and pray a *Certiorari* to the Mayor, to *certify* the Inrollment of the Statute; and if the Mayor doth return, that he hath twice, or oftner, *certified* the ſame before that time, as appeareth by the Inrollment made by the Mayor; if there appear no ſuch *Certificate* upon Record in the *Chancery*, then he who hath the Bond of the Statute, may ſue forth a new *Certiorari* to the Mayor, reciting in the Writ, that there is not any *Certificate* recorded in the *Chancery*, and commanding him to *certify* the Inrollment of the Statute which is before him; and upon the ſame he may have an *alias* and *pluries* againſt the Mayor, if he will not *certify* the ſame, and alſo an Attachment againſt the Mayor, directed to the Sheriff.

THE Writ of *Certiorari* is an original Writ, and iſſueth ſometimes out of *Chancery*, and ſometimes out of the *King's Bench*, Vide 10 El. Dy. 274. 275.

Bench, and lieth where the King would be *certified* of any Record which is in the Treaſury, or in the *Common Pleas*, or in any Court of Record, or before the Sheriff and Coroners, or of a Record before Commiſſioners, or before the Eſcheator; then the King may ſend that Writ to any of the ſaid Courts or Officers, to *certify* ſuch Record before him in *Banco*, or in *Chancery*, or before other Juſtices, where the King pleaſeth to have the ſame *certified*; and he or they, to whom the *Certiorari* is directed, ought to ſend the ſame Record according to the Tenor of the Writ, and as the Writ doth command him; and if he or they fail ſo to do, then an *alias* ſhall be awarded, and afterwards a *pluries*, *vel cauſam nobis ſignifices*, and after an Attachment, if a good Cauſe be not returned upon the *pluries*, wherefore they do not ſend the Record.

Also the King might, by ſuch a Writ of *Certiorari*, ſend for the Tenor of ſuch Record, or for the Tenor of the Tenor of the Record, at his Election; and thoſe Writs ought to be obeyed, and the Record ſent as the Writ commands them to do; and the Form of ſome of thoſe Writs here followeth:

Rex

Rex, dilecto & fideli ſuo R. *ſalutem. Quia quibuſdam certis de cauſis certiorari, ſuper recordo & proceſſu utlagariæ in* I. *com.* L. *promulgatæ, & coram vobis & ſociis veſtris juſtitiariis noſtris, ad diverſas felonias in com. prædicta audienda & terminand. aſſign. retornat: vobis mandamus quod tenorem recordi & proceſſus præd. (vel ſic) tenorem rec. & proc. utlagariæ prædict. cum omnibus ea tangentibus nobis in cancellariâ noſtrâ ſub ſigillo veſtro diſtincte & aperte ſine dilatione mittatis, & hoc breve,* T. *&c.* Certiorari Reg. 283. b.

'THE King, to his beloved and faithful *R.* Greeting. Inaſmuch as we are willing, for ſome certain Cauſes to be certified of the Record and Proceſs of Outlawry, proclaimed in *I.* in the County of *L.* and returned before you and your Companions our Juſtices, aſſigned to hear and determine divers Felonies in the County aforeſaid: We command you, that the Tenor of the Record and Proceſs aforeſaid, (or thus) that you ſend us diſtinctly and openly without Delay, the Tenor of the Record and Proceſs of the aforeſaid Outlawry, with all Things concerning them, and this Writ into our *Chancery*, under your Seal, witneſs, *&c.*' Certiorari of an Outlawry.

AND to *certify* Indictments taken before the Juſtices in *Eyre*, the Form is ſuch:

Reg. 283. b.

Rex, &c. Quia ſuper præſentatione factâ coram vobis & ſociis veſtris juſtitiariis noſtris ultimo itinerantibus in com. Linc. *de morte* A. *unde* B. *captus & detentus in priſonâ noſtrâ de* N *rettatus eſt, & etiam ſuper inquiſitione inde coram vobis ibidem factâ, quibuſdam certis de cauſis volumus certiorari: vobis mandamus quod inrotulationem præſentationis & inquiſitionis prædict. nobis ſub ſigillo veſtro diſtincte & aperte ſine dilatione mittatis, & hoc breve* T. *&c.*

Certiorari of a Preſentment and Inquiſition on the Death of a Man.

'THE King, *&c.* Becauſe we are deſirous, for certain Reaſons, of being certified of a Preſentment made before you and your Companions our Juſtices laſt in *Eyre*, in our County of *Lincoln*, of the Death of *A.* whereupon *B.* taken and detained in our Priſon of *N.* is convicted; and alſo of the Inquiſition thereupon before you then taken: We command you, that you ſend us the Inrolment of the Preſentment and Inquiſition aforeſaid; and this Writ, under your Seal, diſtinctly and openly, without Delay, witneſs, *&c.*

BUT

But the *King's Bench* may have the Record itſelf *certified*, becauſe it is their own Declaration, and the chief Juſtice may carry it where he pleaſes.

And there is another Form of Writ directed to the Coroners.

Rex, coronatoribus ſuis in com. Linc. *ſalutem. Quia, &c.* (uſq; ibi) *proceſſu cujuſdam appelli, quod* W. *nuper probator defunctus fecit verſus* S. *de quâdam roberiâ quam iidem* W. *&* C. *in com. &c. ad invicem feciſſe dicebantur: vobis præcipimus quod recordum et proceſſum ejuſdem appelli cum omnibus ea tangentibus nobis ſub ſigillis veſtris, &c.* Reg. 284.

'The King, To his Coroners in the 'County of *Lincoln*, Greeting. Becauſe, '*&c*, (down to) Proceſs of a certain Ap- 'peal which *W.* late an Approver, deceaſ- 'ed, made againſt *S.* of a certain Robbe- 'ry, which the ſame *W.* and *C.* in your 'County, *&c.* are ſaid both to have com- 'mitted: We command you, that the 'Record and Proceſs of the ſame Appeal, 'with all concerning them, to us, un- 'der your Seals, *&c.*' Certiorari of an Appeal.

And this Writ lieth, where a Man before Juſtices, becometh an Approver, and

the Coroner appointeth him to make his Approvement, and afterwards the Approver dieth, the King may write unto the Coroner to ſend him the Record of the Approvement.

ANOTHER Form of a *Certiorari* to the Mayor and Sheriffs of *London.*

Reg. 284. *Rex, majori & vicecomitibus* London. *ſalutem. Quia quædam negotia per appellum, indictamenta, & attachiamenta, coram vobis in civitate præd.* London. *nuper intrata nondum terminantur, & quædam inquiſitiones in eâdem civitate factæ fuerunt retornatæ, quorum quidem negotiorum inquiſitiones, recorda & proceſſus penes vos reſident ut dicitur, & quæ omnia per dilectos & fideles noſtros* B. *&c. juſtitiarios noſtros ad diverſas tranſgreſſiones in civitate præd. factas audiend. & terminand. aſſign. expediri volumus & finaliter terminari: vobis mandamus quod præd. recordum & proc. cum omnibus ea tangentibus præfatis juſtitiariis ſub ſigillo, &c.*

Certiorari to the City of *London*, to certify inquiſitions, *&c.*

'The King, to the Mayor and Sheriffs 'of *London*, Greeting. Becauſe certain 'Proceedings by Appeal, Indictments, and 'Attachments, lately entered before you, 'in the aforeſaid City of *London*, are not 'yet determined, and certain Inquiſitions 'taken

'taken in the ſame City were returned; 'the Inquiſitions, Records, and Proceſſes 'of which Proceedings remain with you, 'as it is ſaid, and all which we are deſirous 'ſhould be expedited and finally deter-'mined, by our beloved and faithful *B.* '*&c.* and our Juſtices aſſigned, to hear and 'determine divers Treſpaſſes committed 'in the aforeſaid City: We command 'you, that the aforeſaid Records and Pro-'ceſſes, with all Things concerning them, 'to our aforeſaid Juſtices, under Seal, '*&c.*'

AND if the King, by virtue of any Writ of *Certiorari*, remove any Record before any of the Juſtices, he may afterwards ſend for that Record, and remove the ſame before himſelf, or other Juſtices at his Election; and then the Writ is ſuch:

Rex, &c. quia quibuſdam certis de cauſis certiorari volumus, ſuper recordo & proceſſu cujuſdam inquiſitionis capta coram dilectis & fidelibus noſtris W. *&c. juſtitiariis noſtris ad gaolam noſtram de* N. *aſſignatis pro morte* E. *unde* C. *pro morte præd. rettatus fuit ut dicitur, quæ quidem recordum & proceſſum coram vobis certis de cauſis venire fecimus quæ penes vos reſident ut dicitur:* Reg. 284. b.

citur: vobis mandamus quod recordum & proc. præd. cum omnibus ea, &c. nobis ſub ſigillo, &c.

Certiorari of an Inquiſition.

'The King, *&c.* Inaſmuch for ſome 'certain Cauſes, we are willing to have 'certified to us the Record and Proceſs 'of a certain Inquiſition taken before our 'beloved and faithful *W.* &c. our Juſti-'ces aſſigned for our Goal of *N.* for the 'Death of *E.* whereupon *C.* for the 'Death aforeſaid, was convicted, as it is 'ſaid; which Record and Proceſs we 'cauſed to come before you for certain 'Reaſons, which remain with you, as it is 'ſaid: We command you, that the Re-'cord and Proceſs aforeſaid, with all 'Things, them, *&c.* to us, under Seal, '*&c.*

And this Writ delivered to the Juſtices ſuſpends their Power, ſo that, if they afterwards arraign the Party upon the Indictment, 'tis erroneous, 21 *H.* 6. 28. Alſo after the Return, although the Indictment be not removed, they can't proceed; and if they do, 'tis Error, 6 *H.* 7. 16. by *Keble*, *Dy.* 254. *Yelv.* 32.

In the *King's Bench*, where they ſend for the Record itſelf, there 'tis Error to proceed, though they are not ſerved, be-

cauſe

cauſe it takes away their Juriſdiction, but it is no Contempt till they are ſerved.

And when the King would be *certified* of an Outlawry in the County, then the *Certiorari* ſhall be as well to the Sheriff, as to the Coroners of the County to *certify* the ſame.

See the Writ directed to the Coroners only. 9 *H.* 4. 7. 36 *H.* 6. 13. *Dy.* 223. namely, where the Default was in the Sheriff for not returning, or miſ-returning the Exigent; ſee Writ to the Coroners, *Reg.* 284. 38 E. 3. 14. & elſewhere; for altho' the Judgment is rendered by the Coroners, as 21 *H.* 7. 33. yet the Record is in the Cuſtody of the Sheriff, and the Coroners have but a ſhort Note or Memorandum of it. *Dy.* 223. ſee in *London* a Writ to the Sheriffs only. *Dy.* 318. ſee upon Record of an Outlawry, *certified* by *Certiorari*, a Charter of Pardon, *&c. Scire facias* iſſued 9 *H.* 4. 7. and the Sheriff ſhall be amerced, if it were returned upon the Exigent *de Quarto Exactus* only, 36 *H.* 6. 13. But the Party ſhall not be diſabled, 21 *Aſſ.* 49. *Capias Utlegatum* ſhall be awarded, 28 *E.* 3. 14. the Goods of the Party ſhall be ſeized as forfeited, *Dy.* 221. *Proctor*'s caſe *contrary* 1. *Inſt.* 288. *vide* the Judgment in *Proctor*'s, that the *Certiorari* ſhall be granted to the Coroners to *certify* the Outlawry,

or to haſten the Sheriff to return the Exigent, or to have him amerced for his Concealment, or to falſify his Return, as if he returns *quarto exactus*, where he was *quinto exactus*, and is not to diſable the Party; for till the Exigent, which is the Warrant of the Sheriff, be returned, there is no Forfeiture. *Contr. Dy.* 318.

But if a man be condemned in the *King's Bench*, and afterwards outlawed for the King's Fine upon his Condemnation, if he will ſue forth a Pardon of the Outlawry, he ought to have a *Certiorari* out of the *Chancery*, to *certify* the Record of the Condemnation, which ſhall be ſuch:

Reg. 284. b. *Rex, di. & fi. ſuo* R. *capitali juſtitiario. ſuo ſalutem, cum* F. *de quâdam tranſgreſſione* E. *vi & armis factâ, coram nobis convictus. & per ea quod non venit coram nobis ad ſatisfaciendum nobis de redemptione ſuâ quæ ad nos pertinet in hâc parte, & præfato* E. *de damnis ſibi in hâc parte adjudicatis, in exigendis poſitus fuiſſet ad utlagandum, & eâ occaſione poſtmodum utlagatus: quæ quidem utlagaria coram nobis jam eſt retornata ut accepimus ac idem* F. *nobis ſupplicaverit ut cum ipſe præfato* E. *de damnis ſuis præd. jam ſatisfecerit velimus ei utlagariam præd. gratioſe perdonare: Nos eâ*

eâ de cauſâ volentem certiorari ſuper recordo & proceſſu utlagariæ predictæ, et ſi idem F. *præfato* E. *de damnis prædictis ſatisfecerit ut eſt dictum necne vobis mandamus quod nos ſuper præmiſſis ſub ſigillo veſtro diſtincte et aperte, &c. reddatis certiores, &c.*

Certiorari.

'The King, to his beloved and faithful *R.* his Chief Juſtice. Greeting. 'Whereas *F.* ſtands convicted before us 'of a certain Treſpaſs, committed with 'Force and Arms on *E.* and for that he 'has not come before us to ſatisfy us for 'his Ranſom, which belongs to us on 'this Account, and the aforeſaid *E.* for 'his Damages on this Occaſion adjudged 'to him, he was put in Exigent to an Outlawry, and thereupon was afterwards 'outlawed; which Outlawry is now returned before us, as we are informed, 'and the ſame *F.* has beſought us, that 'as he has now ſatisfied the aforeſaid *E.* 'for his aforeſaid Damages, we would 'be graciouſly pleaſed to pardon him 'the aforeſaid Outlawry: We therefore 'deſirous of being certified of the Record and Proceſs of the aforeſaid 'Outlawry, and whether the ſame *F.* 'has ſatisfied the aforeſaid *E.* for his 'Damages aforeſaid as it is ſaid, or not:

'We

'We command you that you make 'us more certain, &c. of the Premiſſes, 'diſtinctly and openly under your Seal, '*&c.*

THIS *Certiorari* muſt be returned into *Chancery*, for from thence the Pardon iſſues, *ſee 5 E. 3 Cap. 12.*

AND if a Man be indicted before Juſtices of Goal-delivery for Felony, and afterwards is acquitted; then if he who is acquitted doubteth he ſhall be troubled by reaſon of the ſame Indictment, he may ſue forth a *Certiorari* to remove the Record and Proceſs of the Inquiſition, *&c.* into the *Chancery*, *&c.*

14 H. 7. 15.
15 H. 7. 5.
36 H. 6. 23.
39 H. 6. 34.

AND if a Man do recover Debt, or Damages before Juſtices of *Oyer and Terminer*, and hath not Execution, he may remove the Record and Proceſs into the *King's-Bench*, and there ſue Execution, and have a *Scire facias* upon that Record, *&c.*

THIS is to be intended of Damages given in the *Aſſizes*, on penal Actions, to be recovered by the Statute before the *Aſſizes*, and antiently when they ſucceeded, the Juſtices in *Eyre* held Debts of all manner of Treſpaſſes, which now they ceaſe to do, and then the King's Court chiefly confined themſelves to Actions ariſing

ariſing within the County where they ſat, but now the Practice is otherwiſe.

AND if a Man do recover Damages in an Action of Treſpaſs before Juſtices of *Oyer and Terminer*, and hath the Party in Execution by reaſon of the Judgment; if the Party in Execution dieth in Priſon, he who recovered may ſue a *Certiorari* to the Juſtices to remove the Record into the *King's-Bench*, that the Juſtices there may award Execution as the Law requireth in ſuch Caſes; and, I think, in that Caſe, that the Party ſhall have Execution by *Elegit*, or *Scire facias*; for it ſeemeth not to be reaſonable, that the Death of him who died in Priſon, ſhould be a Satisfaction to the Party; yet *quere*, for the ſame is doubted.

34 H. 6. 47. *contra* 4 E. 4. 39. 33 H. 6. 48. 47 E. 3. *Execut.* 41. Cro. Jac. 143.

See the Statute 21 *Jac.* 1. *Cap.* 24. by which the Law is now ſettled in that Point, and the Party ſhall have Execution by *Elegit*, or *Fieri facias*, and for Authorities, *ſee* 5 *Co.* 86. 2 *Co.* 20. 186. 143. *Rol. Abr.* 903. *Hob.* 56. *Cro. Eliz.* 850. 851. *Cro. Jac.* 143. *F. N. B.* 246. *(B)*. *See before* 136.

IF a Man be arraigned of Murder, and found Guilty *ſe defendendo*, for which he is bailed, or committed to Priſon, he may have a *Certiorari* to remove the Record into *Chancery*, that he may ſue forth

a

a Pardon thereupon, according to the Courſe of the Law, *&c.*

If a Man recover Damages in Treſpaſs in the *King's-Bench*, and hath the Defendant's Lands in Execution by *Elegit*, and then he who recovers is diſſeiſed by the other, for which he bringeth an *Aſſize* before the Juſtices of *Aſſize*; he who bringeth the *Aſſize* ought to have a *Certiorari* to the Chief Juſtice of the *King's-Bench*, to *certify* the Record and Proceedings to Judgment given in the *King's-Bench*, and of the Execution there; and the Plaintiff may have the Record in *Chancery* exemplified under the great Seal (if need be) to the Juſtice of *Aſſize*.

And if a Man recover by *Aſſize* of *Novel Diſſeiſin*, and the Party will ſue an Attaint in the *Common Pleas*, or in the *King's-Bench*, he ought to ſue a *Certiorari* to the Juſtices of *Aſſize*, to remove the Record into the *King's-Bench*, or into the *Chancery*, *&c.* that he may ſend the ſame before the Juſtices, before whom the Attaint is ſued, *&c.* and it appeareth by the Regiſter, in the Title *(Certiorari)* that if falſe Judgment be given before the Steward, and Marſhal of the King's Houſe, upon a Plaint there ſued, that the Party may ſue an Attaint by Writ before the Steward, and Mar-

ſhal, to attaint that Jury, *&c.* And that the King may ſend a *Certiorari* to *certify* the Record into *Chancery*, which ſhall be directed to the Steward, and Marſhal of the King's-Houſe; but the Record ſhall be *certified* under the Seal of the Steward only, as appears by the Words of the Writ, *&c.*

THERE is another Writ of *Certiorari* directed to the Treaſurer, and Barons of the *Exchequer*, to *certify* the King of the Debt, which *I.* oweth unto him, and of the Debt which the Anceſtor of the ſaid *I.* owed the King, and which are clear Debts, and to *certify* the ſame without Delay under the *Exchequer* Seal, and not into *Chancery*, nor into the *King's-Bench.* Reg. 286.

THERE is another *Certiorari* directed to the Juſtices of Goal-Delivery, to *certify* the Record and Proceedings upon an Indictment of Murder, and Acquittal thereupon into the *Chancery*, *&c.* Reg. 286.

THERE is another *Certiorari* directed to the Steward and Marſhal of the King's Houſe, to *certify* under the Seal of the Steward into the *King's-Bench*, an Indictment taken before the Steward and Marſhal, which the King would have to be determined only before him in the *King's-Bench.* Reg. 286.

THERE

Reg. 286. b. THERE is another Writ of *Certiorari* to the Mayor and Sheriffs of *York*, to *certify* the Tenor of the Record and Proceedings in an *Aſſize* of freſh Force, ſued before them in the ſame City without Writ, and to *certify* the Tenor of the Record and Proceedings in the *Chancery*.

Reg. 286. b. THERE is another Writ of *Certiorari* to the Biſhop of *Oxford* to *certify* into the *Chancery*, how many Perſons were admitted, inſtituted and inducted into ſuch a Church, ſince the firſt Year of *King E.* 4. until this Time, and at whoſe Preſentation, and by what Title, and in what Manner.

Reg. 287. THERE is another Writ of *Certiorari* to the *Cuſtos Brevium*, to *certify* to the King in the *Chancery*, the Tenor of the original and judicial Writs, and the Warrants of Attorney which are in his Cuſtody concerning ſuch an Action or Suit.

Reg. 287. AND another Writ directed to the Treaſurer and Chamberlains of the *Exchequer*, to *certify* the King in the *Chancery* the Record and Proceedings of a Writ of *Quo Warranto* ſued by the King's Anceſtor, King *Edward* the *firſt*, againſt the Abbot of *Weſtminſter*, for certain Liberties claimed by the ſame Abbot, *&c.*

THERE

THERE is another Writ of *Certiorari* to the Juſtices of the Peace, to *certify* into the *Chancery*, the Tenor of the Records and Proceſs of Outlawry of ſeveral Perſons returned before them. Reg. 286. b.

AND another Writ of *Certiorari* to the Commiſſioners of Sewers, to *certify* the King in the *Chancery*, at a certain Day, al the Preſentments before them made, againſt ſuch a Perſon, *&c.* Reg. 287. b.

AND a Writ of *Certiorari* directed to the Chief Juſtice of the *Common Pleas*, to *certify* the Tenor of a Record and Proceedings of Outlawry againſt ſuch an one in *London*, remaining in *Middleſex* before the Juſtices of the *Common Pleas* and to *certify* the ſame into the *Chancery*. Reg. 287. b.

AND if a Baron who is a Peer of the Realm be ſued in the *Common Pleas*, and Proceſs be awarded againſt him by *Capias* or Exigent, then he may ſue a *Certiorari* in the *Chancery*, directed to the Juſtices of the *Common Pleas*, or *King's-Bench*, teſtifying that he was Peer of the Realm, commanding them to award ſuch Proceſs againſt him as they ought to do againſt a Peer of the Realm; and the Writ is ſuch:

Rex juſtitiariis ſuis de banco ſalute, mandamus vobis, quod ſi Georgius L. *miles*, De Baron. Regni *Recordari.* Reg. 287. b.

miles, coram vobis ad ſectoun alicujus per actionem perſonalem implacitatus exiſtat; Talem proceſſum & non alium verſus ipſum in actione præd. fieri faciatis, qualem verſus dominos magnates, comites, ſive barones regni noſtri Angliæ, *qui ad parliamenta noſtra de ſummonitione noſtrâ venire debent, aut eorum aliquem ſecundum legem & conſuetudinem regni noſtri* Angliæ *fuerit faciend. Quia præd.* Georgium *unum baronum regni noſtri præd. ad parliamenta noſtrâ, de ſummonitione regia venientium recordamur. Et hoc vobis mandamus & aliis quorum intereſt innoteſcimus,* T. *&c.*

Recordari of a Baron of the Realm.

'The King to his Juſtices of the 'Bench, Greeting. We command you, 'that if *George L.* Knight, is impleaded 'before you at the Suit of any one, by 'perſonal Action; that you cauſe ſuch 'Proceſs to be had againſt him, and no 'other in the aforeſaid Action, as are 'had againſt Lords, *Grandees, Earls, 'or Barons of our Kingdom of *England*, 'who ought to come to our Parliament 'upon Summonce, or any of them, ac-'cording to the Law and Cuſtom of our 'Kingdom of *England*; becauſe we have 'inrolled the aforeſaid *George*, one of 'the Barons of our Kingdom aforeſaid, 'to

* *Dukes.*

'to come to our Parliament on the royal 'Summonce, and this we command you, 'and notify to others whom it concerns. 'Witneſs, *&c.*

AND if a Man recover Damages and Coſts in an *Aſſize* of *Novel Diſſeiſin*, he may ſue a *Certiorari* to remove the Record into *Chancery*, directed to the Juſtices of the *Aſſize*, to the Intent that the King may ſend the ſame into any of his Courts, that he who recovereth may ſue Execution for the Damages recovered; and upon that Record ſent into the *King's Bench*, he ſhall ſend the Record into the *Common Pleas* by Writ of *Mittimus*, directed to the Juſtices there, that they do as they ought to do according to the Law, to make the Damages to be levied.

There is another Form of *Certiorari* by theſe Words:

Certiorari utlagariæ in banco regis. Reg. 288. b.

Rex vult certis de cauſis certiorari, ſuper tenore recordi, & proceſſus utlagar. in W. *de* B. *in Com.* Midd. *huſbandman, in eodem comitatu vel in* Huſtingo *noſtro* London. *promulgatæ, et coram juſticiariis ipſius regis de banco retornatæ, quæ quidem recordum et proceſſum idem rex coram eo certis de cauſis venire fecit ut dicitur, ac ſi idem* W. *ſe reddiderit priſonæ* Mareſcal-

ciſæ *ipſius regis coram eo occaſione præd. necne. Ideo tenor recordi et proceſſus ut legar. præd. nec non certificatio redditionis illius eidem regi in cancellariam tuam ſub ſigillo* Johannis Forteſcu *capitalis juſtitiarii ſui ad placita coram ipſo rege tenenda, diſtincte, et aperte, ſine dilatione mittantur cum hâc billâ* T. *ipſo rege apud* Weſtm. 12 *die* Feb. *Anno regni ſui treceſimo nono.*

Certiorari of an Outlawry in the *King's Bench.*

'THE King is deſirous for certain Cauſes, to be certified in regard to the Tenor of a Record and Proceſs of Outlawry againſt *W.* of *B.* in the County of *Middleſex*, Huſbandman, proclaimed in the ſame County, or in our *Huſtings* of *London*, and returned before the King's Juſtices of the Bench; which Record and Proceſs the ſame King has cauſed, for certain Reaſons, to come before him, as it is ſaid; and alſo, whether the ſame *W.* has ſurrendered himſelf to the Priſon of the *Marſhalſea* of the ſame King, before him, on the aforeſaid Occaſion, or not. Therefore let the Tenor of the Record, and Proceſs of the aforeſaid Outlawry, as alſo a Certificate of the Surrender, be diſtinctly and openly ſent into our *Chancery*, under the Seal of *John Forteſcu* his

'his Chief Juſtice, for the Pleas to be 'held before the King himſelf, together 'with this Bill. Witneſs, the King him-'ſelf at *Weſtminſter*, the 12th Day of '*February*, in the 39th Year of his 'Reign.'

And by that appeareth, although the Record be remaining in *Banco*, yet the King may ſend it to be removed into the *Chancery*; but it ſeems the Tenor only is removed—And if a Man be arraigned of Murder, and it is found that he killed the Party *ſe defendendo*, he ought to ſue a *Certiorari* to remove the Record into the *Chancery*, and upon the Removal thereof to have his Pardon; and the Form of the Pardon doth appear in the *Reg. Fol.* 287. *b.* and 288.

And if a Man be attainted in an *Aſſize* of *novel Diſſeiſin* before the Juſtices of *Aſſize*, of a Diſſeiſin with Force, and be afterwards outlawed for the King's Fine; if he will have a Pardon of the Outlawry, he ought to have a *Certiorari* directed to the Juſtices of *Aſſize*, to *certify* the King in his *Chancery*, the Tenor of the Record of the *Aſſize*; and alſo another Writ to the Juſtices to *certify* the King in his *Chancery*, whether the Defendant in the *Aſſize* hath yielded himſelf to Priſon, and

hath ſatisfied the Party his Damages; and if the ſame be ſo *certified* in the *Chancery*, then upon that *Certificate* he ſhall have his Pardon of the Outlawry, and the Form of the Charter of Pardon appears in the *Reg.* 288.

AND if a Man be condemned in the *Common Pleas* in Debt, and Outlawry upon the ſame, then, before he ſhall have his Pardon, he ought to yield himſelf to the Priſon of the *Fleet*, and ſatisfy the Party, and the Record of his Condemnation and of the Satisfaction, ought to be *certified* by *Certiorari* unto the King in his *Chancery*; and thereupon he ſhall have his Pardon, and that is by the Stat. 5 *E.* 3. *Cap.* 12.

AND if a Man be outlawed ſeverally, at the Suit of three ſeveral Perſons in ſeveral Actions in which he was condemned, he ought to ſue a *Certiorari* to remove the Tenor of thoſe Records and Proceſs into the *Chancery*; and alſo to have a *Certiorari* to the Juſtices of the *Common Bench*, if the Suit be there, to *certify* the King in *Chancery*, whether he hath yielded himſelf to the Priſon of the *Fleet*, and hath *ſatisfied* the Parties; and when the Chief Juſtice hath *certified* the ſame into the *Chancery*, then he ſhall have his Pardon for the Outlawries, and not

not before; and the Form of the Pardon appeareth in the *Reg.* 288.

THERE is another *Certiorari* to the Eſcheator, to *certify* the Manner and Cauſe of taking of Lands into the King's Hands after the Death of one; and the Writ is ſuch:

Certiorari ſuper modo & cauſâ captionis. Reg. 293. b.

Rex, eſcaetori ſuo, &c. quibuſdam certis de cauſis certiorari volumus, ſuper modo & cauſâ captionis terrarum & tenementorum quæ fuerunt I. *defuncti in* B. *in ballivâ tuâ per te in manum noſtram ut dicitur: tibi præcipimus quod nos in* cancellariâ *noſtrâ ſuper modo & cauſâ præd. ſub ſigillo tuo diſtincte, et aperte, ſine dilatione reddas certiores, hoc breve nobis remittentes,* T. *&c.*

Certiorari of the Manner and Cauſe of a Caption.

'THE King, to his Eſcheator, *&c.* we are deſirous, for ſome certain Reaſons, to be certified of the Manner and Cauſe of your taking the Lands and Tenements which belonged to *I.* deceaſed, in *B.* in your Bailiwick into our Hands, as it is ſaid: We command you, that you, without Delay, make us more certain of the Manner and Cauſe aforeſaid, diſtinctly and openly, under your Seal, in our *Chancery*, remitting to us this Writ, Witneſs, *&c.*

BUT Note, it is enacted by Statute, that if the Eſcheator find any Office of any Lands or Tenements for the King, that he ought to return the Office into the *Chancery*, or into the *Exchequer*, within a Month after the finding thereof, upon Pain of 20*l.* payable to the King, and to him that will ſue for the ſame; and that Statute was made *Anno* 8. *H.* 6. *Cap.* 16.

THERE is another *Certiorari* directed to the Eſcheator, to *certify* the King in *Chancery*, at his Peril, the Value of the Knights Fees, and of the Advowſons which *I.* had, who is dead, who held of the King the Day of his Death *in Capite*; and the Writ is thus:

Certiorari de feodis militum & advocationibus eccleſiarum. Reg. 296. b.

Rex, eidem ſalutem. Volentes certis de cauſis certiorari, ſuper vero valore feodorum militum et advocationum eccleſiarum quæ fuerunt I. *defuncti qui de nobis tenuit in capite in ballivâ tuâ die quo obiit, & quæ occaſione mortis ejuſdem* I. *capta ſunt in manum noſtram: tibi præcipimus quod feoda illa it advocationes præd. per ſacramentum, &c. diligenter extendi fac. quantum videlicet valeant per annum in omnibus exitibus juxta verum valorem eorundem, et extentam illam diſtincte et aperte factum, nobis ſub ſigillo tuo et ſigillis eorum*

rum per quos facta fuerit ſine dilatione mittatis, et hoc breve, T. *&c.*

'THE King to his Eſcheator, *&c.* will- Certiorari of Knight's Fees and Advowſons of Churches.
'ing to be certified, for certain Cauſes, of
'the true Value of Knights Fees, and the
'Advowſons of the Churches which be-
'longed to *I.* deceaſed, who held of us in
'chief in your Bailiwick on the Day he
'died, and which by occaſion of the Death
'of the ſame *I.* are taken into our Hands.
'We command you, that you cauſe the
'Fees and Advowſons aforeſaid, to be
'carefully extended by Oath, *&c.* namely,
'how much all their yearly Rents are
'worth, according to their true Value;
'and that you, without Delay, ſend us that
'Extent diſtinctly and openly, under your
'Seal, and the Seals of thoſe by whom it
'ſhall be made, and this Writ, Witneſs, *&c.*

AND if a Lunatick or a Mad-Man doth kill a Man, or if a Man doth kill a Man by Misfortune, or if an Infant of eight Years old doth kill a Man; if they will ſue a Pardon for the ſame, the Uſe is, to ſue a *Certiorari* to remove the Tenor of the Record and Proceſs into the *Chancery*, and thereupon to have a Pardon; and in the *Regiſter* do appear, ſeveral Forms of ſuch *Certioraries* to remove Re-

cords, which a Man may ſee there more fully, and therefore they are not here mentioned.

Bro. Abr. Tit. Cauſe de remov. Plea 47. Lilly's Pract. Reg. Tit. *Certiorari.*

A *Certiorari* removes the Record in any civil Cauſe, from the inferior Court, though the Record is brought up above; yet they do not proceed where that Record leaves off, but they begin the whole Proceedings *de novo* in the Court above, for there is no Continuance from the inferior to the ſuperior Court, and therefore they cannot proceed on that Record which was below, for they count, and plead in the ſame Caſe before the Judges of the ſuperior Court, for when the Record comes up, the Cauſe is to be adjudged before them, and therefore they counted and pleaded * *Ore tenus* before them, and now it is tranſcribed on a Roll of their own Court; for though the *Certiorari* removes the Record in the Condition that it is, and thereby transfers the ſame into the ſuperior Court, yet it does not make the Roll of the inferior Court a Record of the ſuperior, but only brings up the Record from the inferior to the ſuperior Court.

But otherwiſe it is, where Conuſance is demanded, and allowed, for there the ſuperior Court gives a Day to the Parties in the inferior Court, and transfers the Roll

* *By Word of Mouth.*

Roll itſelf; and the Reaſon of the Difference is, that the inferior Court which has Conuſance being taken out of a ſuperior, they continue it into the inferior Court, as a Court erected by the King, and taken out of the ordinary Juriſdiction, and therefore they go on as in the ſame Court; but when the Cauſe is taken from the inferior to the ſuperior Court, they do not proceed as in the ſame Court, becauſe it is ſuperior, and before greater Judges, and it would be below the greater Juriſdiction, not to proceed on it as * *res integra*, or to ſuffer any Continuance to be made from a ſubordinate Power to theirs.

No *Certiorari* lies to a County Palatine in civil Cauſes, becauſe it is a ſuperior Juriſdiction, and therefore, the Cauſes cannot be transferred the one from the other, nor has the *King's-Bench* any Power over theſe, more than they have over the *Common Pleas*, unleſs to correct their Judgments by Writ of Error, for they are ſuppoſed to be erected, or confirmed by Act of Parliament, or Preſcription, that is tantamount, and therefore are exempt from the Authority of other Courts; but otherwiſe it is in the Caſe of royal Franchiſes, which are only by Charter from the King, for they are ſubject

3 Mod. 230. Salk. 148, *but ſee Lord Raym.* 581.

* *An intire Matter.*

ject to the Controul of the ſuperior Courts, and to take from them the Cauſes in which the Defendant, who poſſibly lives out of the County, may not be able to procure Bail.

But in criminal Matters, even the Palatine Juriſdiction is ſubject to a *Certiorari*, becauſe it is the King's Declaration, and he by his Prerogative may remove it wherever he pleaſes.

So the grand Seſſions of *Wales* being the ſuperior Juriſdicton within the Diſtrict, is not ſubject to any *Certiorari* in civil Cauſes; *aliter* in Criminal Affairs.

Bro. Tit. Cauſe de remover, Plea, 48. Salk. 148. *Croſs* and *Smith*. 3 Mod. 329. 12 Mod. 643. 3 Salk. 79 pl. 4. 7 Mod. 138. 2 Ld Raym. 836.

If a *Certiorari* be ſent to an inferior Court, to remove the Cauſe, they are thereby ſtopped, and if they proceed afterwards, it is Error, nor can they return their Conuſance to ſuch *Certiorari*; for though they have Power to hold Plea by the King's Charter, yet they have it not in Oppoſition to the King's Writ, and ſuch Franchiſes are preſum'd to be erected in favour of the Plaintiff and Defendant, but they may not be traverſed in the ſuperior Court, and either of them may renounce * *Juri pro ſe introducto.*

Salk. 144.

If an Act of Parliament erects an inferior Juriſdiction, not to proceed according to the Courſe of the Common Law,

* *A Right introduced for his own Benefit.*

Law, if no ſuch Writ of Error be given by ſuch Act, it doth not lie, but then a *Certiorari* will lie to remove their Proceedings, either before, or after Judgment; becauſe when an inferior Juriſdiction is erected, it is bounded by that Law which erects the Juriſdiction, and therefore the Court of *King's-Bench* as the laſt executive Power of the Law, is to ſee that ſuch Juriſdictions are kept within their Limits; therefore though the College of Phyſicians are impowered by Act of Parliament to puniſh and impriſon Phyſicians, that give unwholeſome Medicines, yet the *King's-Bench* will remove by *Certiorari*, any ſuch Order of the Phyſicians for Fine and Impriſonment.

So tho' the Commiſſioners of Sewers are made final, yet the *King's-Bench* ſhall remove them,* becauſe they are an inferior Juriſdiction, and therefore * *ex natura rei* are to be kept within their Bounds, and though 23 *H.* 8. *Cap.* 5. and 13 *El. Cap.* 9. ſays, the Commiſſioners of Sewers ſhall not be obliged to return any *Certificates*, but into *Chancery*; yet if Commiſſioners refuſe to obey a *Certiorari*, they ſhall be committed, becauſe theſe Statutes are not ſuppoſed to take

See Seſſ. Caſ. 247, 180, 253. 12 Mod. 390. *Callis* on Sewers, 172.

* *From the Nature of the Thing.*

take away the Authority of the *King's-Bench*, from the keeping them within their Limits; but becauſe Juriſdictions erected againſt ſudden Inundations, the Court takes this Precaution, that before ſuch Orders are filed, the Court will hear Counſel concerning them, that if there be any ſudden Occaſion, they may be ſent down; but after filing, unleſs the Complaint be of the ſame Term of the Irregularity of the Filing, they never grant a *Procedendo*, for when the Order is filed, it becomes a Record of the *King's-Bench*, and they either quaſh it, if irregular, or inforce it by their own Power.

Salk. 147. 492. 521. 524. 525. Caſ. of Set. and Rem. 269. 7 Mod. 10. Seſſ. Caſ. 135. See Seſſ. Caſ. 27. Stra. 232. 567.

WHERE a *Certiorari* removes an order of Juſtices whereon Appeal is granted to the next Seſſions, as for the removing of Poor, *&c.* there no *Certiorari* ought to be granted till the Time of Appeal is expired; becauſe, the Quarter Seſſions is final as to the Merits, and ſuch *Certioraries* would hinder the Remedy of Appeal provided by the Statute, ſince the Court above cannot proceed on the Merits.

Salk. 148. Lord Raym. 580. See Sid. 296. Comyn 86. pl. 54. 12 Mod. 403. 490. 2 Stra. 900.

BUT where there is no limited Time by any Statutes for Appeal, though there be a ſuperior Juriſdiction, there the Court will grant a *Certiorari*; as where Orders of

of Juſtices were made for the Repair of *Cardiffe* Bridge, though the grand Seſſions might ſend a *Certiorari*, becauſe they had a Superintendency over the Juſtices; yet ſo had the *King's-Bench* too, who are to keep all inferior Juriſdictions within their bounds. Barnard K. B. 445. Seſſ. Caſ. 329.

ALL Indictments may be removed as well before, as after Conviction; but if the *Certiorari* comes after the Jury is ſworn, the Juſtices muſt return the Verdict; becauſe the Jury are ſworn to try the Iſſue, and the Criminal is to be put on ſuch Jury; but this ſeems to have been intended where the *Certiorari* has not the Clauſe * *Quod Dominus Rex vult. præd. coram ſeipſo terminari, et non alibi.* But in ſuch Caſes when it is after Verdict, the Court will often grant a *Procedendo*, that the Juſtices who tried the Priſoner, may fine him, being beſt conuſant of the Heinouſneſs of the Offence. Salk. 144. 149. Before 104. Comb. 191. Salk. 145.

IN an Indictment before the Juſtices of *Aſſize*, or Goal-delivery, the Court will not remove without ſpecial Cauſe; becauſe the King may have his Indictment, which is his Declaration, where he pleaſes; yet when it is before a proper Juriſdiction, and in a proper Way of being ſpeedily Salk. 144. 149. 150. Seſſ. Caſ. 256.

* *That the Lord the King will have it determined before himſelf, and no where elſe.*

ſpeedily determined, it would generally delay the Proceedings againſt Criminals if it ſhould be removed; but this is diſcretionary in the Court according to the Nature of the Offence.

Salk. 145. So where there is a Proſecution appointed by the Statute, as before Juſtices for not taking the Oaths at the Quarter-Seſſions, for not coming to Church, there the Court will not remove it till after Conviction; becauſe it would render the Proſecution ineffectual, ſince they cannot proceed otherwiſe than as the Court has appointed.

Salk. 146. If a *Certiorari* iſſues to remove Indictments againſt ſeveral Perſons, * *in quibus A. B. & C. indictati ſunt*, without ſaying, † *vel aliquis eorum indictat. exiſt.* this will not remove the Indictment Salk. 151. where *A.* is indicted alone; ſo if it be to remove Orders againſt *A.* and *B*, it will not remove an Order againſt *A* alone.

A *Certiorari* after Conviction, ought to remove the Indictment and Conviction, Salk. 147. pl. 17. and if it makes mention of the Indict- 6 Mod. 61. ment only, and not of the Conviction, 3 Salk. 78. pl. 1. the *Certiorari* ſhall be quaſhed; becauſe 2 Ld. Raym. 971. the Court proceeds to fine, or remits it to the Juſtices to fine the Parties, which it cannot do on a Indictment alone.

The

* *In which A. B, and C. are indicted.*
† *Or any of them is indicted.*

THE *Fiat* for the *Certiorari*, muſt be of the ſame Term of which it iſſues, and to remove Indictments by the new Statute, the Judge muſt ſign the *Certiorari*, as well as the *Fiat*. Salk. 150. 3 Salk. 80. pl. 6. 2 Hawk. Pl. Cr. 289. Chap. 27. Sect. 40.

THE Tenor of an Order is not a good Return, for they muſt judge on the Record itſelf. Salk. 147.

THE Return of a Conviction in Engliſh is good, becauſe the Juſtices are not obliged to record in Latin. Salk. 149.

ON a *Certiorari* to return the Conviction of Deer-ſtealing, if a Warrant to diſtrain be firſt iſſued, the Conſtable may ſell the Goods, becauſe the Execution is begun, and the *Certiorari* is not intended more than a Writ of Error, to hinder an Execution from proceeding which was begun before. Salk. 147. 6 Mod. 83.

ON a *Certiorari* to return an Inquiſition for a forcible Detainer, if the Force continues after the *Certiorari*, the Juſtices may record it, otherwiſe the Party would have been prevented of his Remedy by the new Force, and would ſhelter himſelf to commit an Injury under the new *Certiorari*; but they cannot award Reſtitution, becauſe the *Certiorari* ſtops the Proceedings, any otherwiſe than to record the Force, that they may have Remedy thereupon above.—6 *H.* 8. *Cap.* 6. The Court Salk. 151. Salk. 352.

Court is enabled to ſend down Indictments of Felony, though they are filed, but in no other Caſes can a Cauſe be remanded when it is once filed.

WRIT OF RIGHT OF DOWER.

THIRDLY, We come to Writs relating to Eſtates for Life, and they either relate to Eſtates in Dower, or to other Eſtates for Life.

FIRST relating to Eſtates in Dower; and they are either,

1ſt, Droitural.
2dly, Poſſeſſory.

FIRST, Droitural, as the Writ of Right of Dower, concerning the Quarentine.

SECONDLY, Poſſeſſory, as firſt, the Writ of Dower, * *unde nihil habet.*

Secondly, the Writ of Admeaſurement of Dower.

Thirdly, the Writ † *de Dote aſſignanda.*

SECONDLY, relating to other Eſtates for Life, as a Writ of ‡ *Quod ei deforceat.*

Firſt of the Writ of Right of DOWER.

DOWER is the Proviſion which the Law makes for the Wife, after the Deceaſe

* *Whereof ſhe has nothing.* † *For aſſigning Dower.*
‡ *That the Party is deforced.*

Deceaſe of her Huſband; and in *Socage Tenure*, it was originally half during the Widowhood, becauſe whatſoever was got during the Coverture, was ſuppoſed to be by the joint Induſtry of them both; but half only during the Widowhood, becauſe it was not to be carried away from that Family into another; ſo in *Knights Service*, it was a 3d; one 3d being allowed for the Performance of the Service, and the other two 3ds were to be divided between the Wife and the Heir; and here the Wife was to hold during her Life; for they conſidered it here, not as an Acquiſition which was to go back into the former Huſband's Family, if ſhe married another; but as a Tenure that was to continue, according to the Form of the Infeudation, which was during Life; they therefore looked on the Marriage Contract, as an Infeudation after the Death of the Huſband; not only in every Manor which he had at the time of the Marriage, but of every Manor which he ſhould have during the Time of Coverture; but ſince the Marriage was only a Contract for ſuch Infeudation, it was not actually made until the Heir had aſſigned, which was the Completion of the Infeudation; hence it was, that the Aſſignment was by the

Heir, whereas all other Infeudations were made *Coram Paribus Curiæ*, therefore the Heir made the Aſſignment as Lord of the Manor, who was to create the Tenure; but if there was any Diſpute, touching the Quantity, it was determinable by the *Pares*. If they did not like the Determination, the Wife might remove it to the County-Court, and ſo to the King's Court, and the Heir immediately to the King's Court; to avoid Delay to the Wife, it was ſet out by the way of *Metes* and *Bounds*, becauſe it was a Tenancy of the Heir, and therefore like all other Lands in Tenure, was to be ſeparated from the Demeſne of the Manor; the Infeudation defeated the Deſcent, becauſe by the Marriage Contract, the Tenure was to take place on the Death of the Huſband; ſo only two 3ds can be ſuppoſed to deſcend in Demeſne to the Heir, ſince in the other 3d, a Tenure is created in the Wife, to hold of the Heir immediately from the Death of the Anceſtor; and the Reaſon why the Law created this as a Tenure was, that the Heir might be obliged to do the Services for it, during the Time of its Continuance, as he was obliged to do for all Lands which he had given out in Tenure, as well as thoſe which he held in Demeſne; and had

there been no Tenure, it had been cut off from the Manor during the Life of the Wife; when the Heir was a Tenant, and no Lord of the Manor, the Aſſignment of Dower was in the Nature of a Sub-infeudation; and this Tenure continues after the Statute of *Quia Emptores Terrarum*, ſince the Heir does not part with the Fee.

The Writ *of Right of Dower* is Patent, and ſhall be directed unto the Heir, to ſue in the Court of the Heir, as it appeareth by *Britton*; and where the Writ is directed unto the Heir of the Huſband, and the ſame Heir is ſeiſed of the Land whereof the Wife demandeth Dower; then if he will not aſſign Dower unto the Feme, the Feme who is Demandant, may remove the ſame by a *Tolt* into the County Court; and alſo may remove the ſame out of the County Court into the *Common Pleas* by a *Pone*, without ſhewing any Cauſe in the Writ, as the Demandant ſhall do in a Writ of Right Patent; but the Tenant in a Writ of Right Patent, ſhall not remove the Plea out of the County Court into the *Common Pleas*, without ſhewing of Cauſe in the *Pone*; and the Tenant in a Writ of Right Patent, or in a Writ of Right of Dower, may remove the Plea into the *Common*

Pleas, by a *Recordare* out of the Court of the Lord, upon Cauſe ſhewed in the Writ; and what Cauſes are ſufficient, and good to remove the Lords Plea out of the Lord's Court, or out of the Country, and what not, does appear in the Regiſter; and therefore ſee the Cauſes there; but the Demandant cannot remove the Plea out of the Court of the Heir, by a *Pone*, becauſe he ought firſt to remove it by a *Tolt* into the County Court, and from the County Court, he may remove it into the *Common Pleas* by a *Pone*, without ſhewing the Cauſe in the Writ as before is ſaid, ſince the Dowreſs holds of the Heir, as the Heir holds over of the Lord, the Writ of Right of Dower, is directed to the Heir, who upon that Writ may aſſign Dower without any further Conteſt; and if the Heir be Lord of the Manor of which the Wife is to be endowed, then the Aſſignment is to be by the Heir, with the Approbation of the *Pares Curiæ*, but if the Heir be only Tenant, and not Lord of the Manor, then the Aſſignment cannot be in the *Court Baron* of which the Tenant holds, becauſe the Writ is not directed to the Lord, to give him Authority to proceed; for the Writ of Right was only where the Controverſy happened between the

immediate Feudatories of the Manor, and the Dowreſs is Tenant to the Heir and not to the Lord; therefore the Writ cannot come into the *Court Baron*, unleſs where ſhe is to be endowed of the Manor itſelf, or where the Lord is Guardian in Chivalry to the Infant, then the Writ ſhall be directed to the Lord to endow her; and this is an Act done by the Lord, as Guardian to the Infant, and as annexed to the Eſtate, which falls into the Lord's Hands, during the Minority of the Infant; but in that caſe, if the Infant had an Eſtate of *Socage-Tenure*, whereof the Wife might endow herſelf, that was an Indowment *de la pluis belle*. If the Heir, or Lord of the Manor, would not endow the Feme, ſhe might have a Tolt into the Sheriff's Court, without any Cauſe ſhewn, becauſe it was in her own Delay; and when the Heir had no Court, unleſs ſhe acquieſced in the Indowment made by him, her only Remedy was to remove it by Tolt immediately; and where the Lord was *Guardian* in *Chivalry*, and refuſed to endow, becauſe ſhe might have Dower *de la pluis belle*, into whatſoever Court the Cauſe was removed, he might plead ſuch Title to Dower in the Wife, in Bar of his Aſſignment, becauſe the Lord was

not obliged to divide his own Feud, if the Wife had otherwiſe a ſufficient Dower to ſuſtain her; and in a Writ of *Right Patent*, the Plea may be removed at the Tenant's Suit, by a *Recordare* out of the Lord's Court into the *Common Pleas*, before the Juſtices there; and by the ſame Reaſon it ſeemeth, it may be removed at the Suit of the Tenant, in a Writ of *Right of Dower*, out of the Heir's Court, into the *Common Pleas*, before the Juſtices there, by a *Recordare* for good Cauſe; but *Quere*.

And if the Huſband do enfeoffe a Stranger of all his Lands, and dieth, and his Heir hath nothing by Deſcent; now if the Feme be to ſue forth a Writ of Right of Dower, it ſeemeth that ſhe ſhall direct it unto the *Feoffee*, for after the Endowment, the *Feoffee* ſhall be her Lord, and ſhe ſhall hold the Dower of him by Fealty; but before the Statute *de quia Emptores Terrarum*, if the Huſband enfeoffe a Stranger of Parcel of his Lands, to hold of him, then if the Feme be to ſue a Writ of Right of Dower againſt the Feoffee, the Writ ſhall be ſued in the Heir's Court, and the Writ be directed unto the Heir, for the Seignory that remaineth in him.

And ſo if the Huſband, at this Day, giveth Parcel of his Manor in Tail, to hold

hold of him, and dieth, the Feme ſhall ſue her Writ of Right of Dower in the Court of the Heir of her Huſband, and againſt the Donee in Tail, and the Writ ſhall be directed to the Heir.—But if the Huſband makes a Gift in Tail, of all the Lands that he hath, and dieth, and the Feme is to ſue a Writ of Right of Dower of that Land, then the Huſband's Heir can't have any Court, becauſe he hath but a *Seignory in groſs*; and therefore it ſtands with Reaſon, that ſhe ſhould bring her Writ of Right of Dower againſt the Donee in Tail, directed to the Sheriff, returnable in the *Common Pleas*; and ſhe ſhall have this Clauſe in the Writ, * *Quia* B, *capitalis Dominus feodi illius nobis inde remiſit curiam ſuam.*

Dower is the Conſequence of the Marriage Contract, which was underſtood, that the Wife ſhould have the 3d Part of the Eſtate the Huſband was ſeized of during the Coverture, to ſuſtain heſelf and younger Children, during her Life: In the *Allodial* Property, ſhe divided with the Children, who were the Huſband's Repreſentatives, and had Half during her Life, becauſe ſhe was ſuppoſed to be equally concerned in the Acquiſi-

* *Becauſe* B. *the chief Lord of that Fee hath committed to us his Court thereof.*

tion.—In *Knights Service*, ſhe had a 3d, becauſe one 3d was allowed for the extraordinary Burthen of the Tenant, one 3d for ſuſtaining the Heir, ſo that ſhe always equally divided with him; but the Heir was always to ſet it out, and ſhe was not to carve for herſelf, becauſe the Wife held of the Huſband's Repreſentative, as inferior to the Huſband, and conſequently as ſubject in Tenure to the Heir, who repreſented him; but if the Heir did not ſet out according to Equality in his Court, ſhe might apply to the County Court, and to the King's Court; and where the Heir had no Court, ſhe might enter * *Dominus remiſit curiam ſuam*, and thereby the Writ of Right of Dower was returnable into the King's Court; but if the Heir had a feudal Court, ſhe might there have it ſet out, and then it was either ſet out, aſſigned by the Heir himſelf, or by his *Pares*; for this was an Act which the Lord himſelf might do, as well as his *Pares* in that Court, becauſe it was preſumed, that he would be rather more beneficent towards his Mother, than act according to the ſtrict Diviſion required by the Law; and this Power continued to the Heir, as long as the Tenure con-

* *Becauſe B. the chief Lord of that Fee, has remitted to us his Court thereof.*

continued; ſo that he had a Power over the Lands as a feudal Lord, before the Statute of *Quia Emptores, &c.* If the Huſband had aliened the Lands, to hold of himſelf, ſince the Feoffee continued feudatory to the Huſband, the Heir was to aſſign Dower in his Court; but ſince the Statute, the Feoffee holds of the Superior Lord, therefore the Heir remits his Court, and the Writ of Right of Dower is to be brought in the King's Court, by * *Dominus remiſit curiam ſuam*; but the Tenant in Tail or for Life, *&c.* did after the Statute hold of the Lord, and therefore the Heir's Aſſignment of Dower continues.

And ſo, if the Huſband make a Leaſe of all his Lands unto a Stranger for Life, and dieth, and the Feme is to bring a Writ of Right of Dower againſt the Leſſee for Life, then it ſeemeth reaſonable, that the Feme have her Writ of Right of Dower againſt the Leſſee for Life in the *Common Pleas*, becauſe that he, in the Reverſion, hath not any Court; and although that this Clauſe, † *Quia B. Capitalis Dominus*, &c. be put in the Writ; if the Lord have not any Court to hold, becauſe it is a Seignory in groſs, and not any

* *Becauſe the Lord hath remitted his Court.*
† *Becauſe the chief Lord*, &c.

any Demeſne Lands to hold a Court, and that there is not any Matter apparent remaining in the *Chancery*, to prove the Lord's Will and Aſſent to remit his Court, yet the Writ returned into the *Common Pleas* before the Juſtices there, is good, and they ſhall proceed thereupon, if the Lord hath not any Court to hold Plea for this Matter; and it ſeemeth, that the Lord ſhall not have his Action againſt the Demandant for ſuing the Writ in the *Common Pleas*, if he hath no Court to hold Plea thereupon, and to do Right unto the Party; but if the Lord hath a Court to hold Plea, then he may have a Prohibition to the Juſtices of the *Common Pleas*, that they do not proceed upon the Plea, otherwiſe not: *quere of this Matter.*——When the Huſband being Lord aliens Lands to hold of the ſupreme Lord, of Conſequence they are no more attendant to his Court; and therefore there is implied a * *Dominus remiſit curiam ſuam*, ſo that no Action lies for the Heir for bringing the Writ in the King's Court, ſince the Anceſtor remitted his Court by ſuch Alienation; and no Action lies by the Meſne Lord, becauſe the Title of the Wife begins before the Tenure aroſe to him; for the Wife's Title ariſes from

* *Whereof ſhe hath nothing.*

from the Seiſin of the Huſband, which was preceding the Alienation, whereby the Alienee is attendant upon the next Lord, and by Conſequence, the Court is remitted to the Crown by Alienation.

And this Writ of Right of Dower lieth where a Feme is endowed of Parcel of her Dower, and ſhe would demand the Reſidue againſt the ſame Tenant, and in the ſame Town; then ſhe ought to ſue this Writ of Right of Dower; for the Words of the other Writ will not ſerve, *viz.* * *unde nil habet*, becauſe that ſhe hath receded Part of her Dower, and therefore of Neceſſity it behoveth her to ſue this Writ of Right of Dower, to recover the Reſidue; and the Writ ſhall be directed unto the Heir, or unto his Guardian, if he be in Ward, as a Writ of Right Patent ſhall be, *&c.* The Reaſon of this is, becauſe poſſeſſory Writs, as the Writ * *unde nil habet* is, muſt demand the whole Dower, of the whole Eſtate of the Huſband, and that poſſeſſory Writ ſhe can have but once; therefore if ſhe omits out of the Writ of * *unde nil habet*, any of the Lands of which the Huſband was ſeized during the Coverture, ſhe is put to her Writ of Right of Dower as to the Reſidue of the Lands.

And

* *Whereof one hath nothing.*

AND if a Feme loſes her Land, which ſhe holdeth in Dower by Default in a *Precipe quod reddat*; yet, according to the Opinion of ſome Men, ſhe hath a Writ of Right of Dower; but it ſeemeth by the Equity of the Statute of *Weſtminſter*, 2 *Cap.* 4. that if a Feme loſe by Default the Land whereof ſhe hath had Dower, that by that Statute, ſhe ſhall have a * *quod ei deforceat*, to recover that Land; and before that Statute, ſhe had no Remedy to recover the Land, but only an Action of *Deceit* if ſhe were not ſummoned in the Writ of Right of Dower. At *Common Law*, if Tenant for Life was barred in the *poſſeſſory* Action, he could never have the Action *droitural*; but if he was barred of his Seiſin, as he was in the poſſeſſory Action, he was barred of his Right for ever; and the Reaſon is, becauſe no body could have a final Judgment to Perpetuity, to put the Lands in Peace, but the very Tenant, or the Tenant in Fee-ſimple of thoſe Lands, and that bound the Right for ever againſt all Perſons, even againſt all Strangers that did not claim within the Year and a Day; but Tenant for Life of Lands claims the Seiſin only, therefore, whatever barred the Seiſin was a Bar to their Right, ſince they had not a meer Right diſtinct from the

13 *Ed.* Chap. 4. 2 Inſt. 34. 7.

* *That he deforces her.*

the Seiſin; and therefore, if ever the Tenant in Dower was barred by Default in a Writ of Dower, * *unde nil habet*, ſhe was perpetually barred thereby; becauſe the Bar to her Seiſin, was a Bar to her Right; but if the Lands were omitted in the Writ of Dower, * *unde nil habet*, the Judgment in that Writ could be no Bar as to the Dower in thoſe Lands, becauſe the Judgment was not concerning the ſame; but as to the Lands mentioned in the Writ, the Judgment by Default was a Bar, till helped by the Statute of *Weſtminſter*, 2 *Cap.* 4. which gives the † *quod ei deforceat*.

And if a Feme hath Dower, and loſe the ſame by *Aſſize* in an Action tried; it ſeemeth ſhe hath no Remedy but by Attaint; for it ſeems ſhe ſhall have no Remedy to recover by a Writ of Right of Dower, becauſe ſhe had the Land once aſſigned to her in Dower, and ſhe was in Poſſeſſion of the ſame; ſo that the Title was executed, and ſo ſhe ought to ſue an Action of her own Poſſeſſion, if ſhe be afterwards deforced; for the Statute only extends to Eſtate for Life, or in Dower, where the Tenants loſe by Default, and not where they are barred by Judgment upon the Merits of their Cauſe.—And after the Plea removed into the *Common Pleas*,

* *Whereof ſhe hath nothing,* † *That he deforces her.*

Pleas, the Proceſs is then a *Grand Cape*, and a *Petit Cape*, and in the Heir's Court, the Manner is to make a Proceſs in the Nature of a Summons, and of a *Grand* and *Petit Cape*, and the Writ directed unto the Heir is thus:

Breve de recto de dote patent. Reg. 3.

Rex, A. *ſalutem. Præcipimus tibi quod ſine dilatione plenum rectum tenens* B. *quæ fuit uxor* C. *de tertiâ parte decem acrarum terræ cum pertinentiis in* W. *quam clamat tenere de te in dotem per liberum ſervitium tertiæ partis unius denarii per annum pro omni ſervitio, quam &c. ei deforceat.*

Writ of Right Patent of Dower.

'THE King, to A. Greeting. We 'command you, that without Delay, you 'do full Right to *B.* who was the Wife 'of *C.* of a third Part of ten Acres of 'Land, with the Appurtenances in *W.* 'which ſhe claims to hold of you in 'Dower by free Service, of a third Part 'of one Penny yearly, for all Services, 'from which, *&c.* he deforces her.'

AND alſo a Feme may have a Writ of Right of Dower of the Moiety, according to the Uſage of *Gavel-kind*, where ſhe hath received Part, and is deforced of Part; and alſo it appeareth by the Regiſter, that the

the Feme ſhall have a Writ of Right of Dower directed unto the Heir himſelf, where he himſelf deforceth her of the Profits of an Office, and the Writ is ſuch:

Rex, A. *ſalutem. Præcipimus, &c. teneas* I. *et* B. *uxori ejus de tertiâ parte exituum provenientium de cuſtodia gaolæ abbatiæ de* W. *et de tertiâ parte trium rodarum terræ, unius rodæ prati, & redditûs tot panum & tot lagenarum cerviſiæ & tot ferculorum per diem, vel per ſeptimanam, vel per annum, cum pertinentiis in villâ* Weſtmon. *quas clamant pertinere ad liberum tenementum ſuum, quod de te tenet in dotem ipſius* B. *in eâdem villâ et tenere de te per liberum ſervitium inveniendi tertiam partem cuſtûs pro cuſtodiâ gaolæ prædictæ et portæ ejuſdem abbatiæ pro omni ſervitio: quæ tu ipſe eis deforcias.*

Pro viro & uxore cum clamant. pertinere ad liberum tenementum, &c. de dote mulieris. Reg. 3.

Nota, *Que in cheſum maner de Bayly, in le quelle le baron avoit fee, quelle Bayly ou office la femme purra per luy meſne, ou per autor pur luy ſufficientiment garder: el avera Dower. Mes auxi come Seneſcal ou Marſhal de* Angleterre, *ou el ne pœct fair offite, el ne ſera my é dowe. Quære de dote commitiſſæ marchiæ. Auxi femme poet avoir brief de droit de dower de medietate ſolonques l' uſage, Reg. ibid.*

Writ of Right Patent of Dower for an Husband and his Wife, when they claim that it belongs to a Freehold, &c. for the Woman's Dower.

'The King, to *A.* Greeting. We command, *&c.* that you render to *I.* and *B.* his Wife, a third Part of the Profits arising from the Wardenship of the Gaol and Abbey of *W.* and a 3d Part of three Rods of Land, one Rod of Meadow, and Rent of so many Loaves, and so many Flagons of Ale, and so many Messes of Meat, by the Day, by the Week, or by the Year, with the Appurtenances in the City of *Westminster*, which they claim to belong to their Freehold, and which they hold of you as the Dower of *B.* in the same City, and to hold of you by free Service, of finding you a third Part of the Expence for keeping the aforesaid Gaol and Gate of the same Abbey, for all Services; from which you deforce them.'

'*Note*, In every Kind of Trust in which the Husband has Office, which Trust or Office the Wife can execute by herself or Deputy, she shall have Dower. But of Steward or Marshal of *England*, which Office she cannot execute, she shall not be endowed. *Quere* of the Dower of a Countess of the Marches? A Wife may also have a Writ of Right of Dower of a Moiety according to Custom.'

SEE 15 *E.* 3. Dower 81. Dower demanded of the Profits coming from a Fair, of *N.* 11. *E.* 3. *Dower* 85. *Co. Lit.* 32. Dower is demandable of the Moiety of Stallage coming from the Fair of *D.* and good, without ſaying the Moiety of the Profits of the Stallage; for Stallage is a Profit. *Raſtal. Entrys* 234. **de tertiâ parte exituum & proficuor. de quodam mercato quolibet anno infeſto, &c.* 12 *E.* 3. Dower may be demanded of the 3d Part of the Office of a Bailiff, Parker, *&c.* without demanding the 3d Part of the Office, becauſe entire; doubted in the Office of *I.* v. 45. *E.* 3. *Dower* 50. where the Feme is endowed of the 3d Part of the Profits of a Mill, and had the Freehold of the 3d Part of the Mill in her, 21 *E.* 3. 51. Dower of the 3d Part of the Office of the Marſhalſea. And by this Writ it appeareth, that a Feme ſhall have a Writ of Right of Dower of that Thing which is appendant, or appurtenant unto the Land which ſhe holdeth in Dower; if ſhe be deforced thereof, ſee *Statham* Tit. *Dower*, 3 *H.* 5.

OF THE WRIT † DE QUARENTINA HABENDA.

THE Writ of † *Quarentina habendâ*, lieth where a Man dieth ſeized of a Meſſuage

* *Of the third Part of the Iſſues and Profits of a certain Fair held every Year, &c.*

† *Having Quarentine.*

and Lands, and immediately after the Death of the Huſband, the Heir, or he who ought to have the Lands after his Death, will put the Wife out of the Meſſuage, *&c.* then the Wife ſhall have this Writ; for by the Statute of *Magna Charta*, *Cap.* 7. the Wife ſhall remain in the Capital Meſſuage after the Death of her Huſband for forty Days, if it be not a Caſtle, and that Writ is Vicountiel, and ſhall be directed unto the Sheriff, and he ſhall hold Plea thereof—This Writ was given by the Statute of *Magna Charta*, *Cap.* 7. and therefore the Statute is recited in the Writ; and it was for the Time which the Wife was to continue in the Huſband's Houſe, and until ſhe had got an Aſſignment of her Dower; and that the unnatural Heir might not turn her out immediately; therefore the Writ is Vicountiel, that the Sheriff might reſtore her, in caſe ſhe was put out before the forty Days were ended; and the Writ is ſuch:

9 *H.* 3. 2 Inſt. 16.

Quod mulier habeat Quarentinam ſuam & rationabile eſtoverium ſuum de communi.
Reg. 175. b.

Rex, vic. &c. vel ballivis ſuis Suth. *ſalutem. Ex querelâ* B. *quæ fuit uxor* R. *accepimus, quod cum in magnâ chartâ de libertatibus* Angliæ *contineatur, quod viduæ maneant in capitali meſuagio maritorum ſuorum per* 40 *dies poſt obitum maritorum prædictorum, niſi meſuagia illa caſtra ſunt, infra*

infra quod tempus dotes ſuæ aſſignentur eiſdem, et quod interim habeant rationabilia eſtoveria de bonis eorundem: I. *de* C. *ipſam* B. *ſtatim poſt mortem prædicti* R. *viri ſui de capitali meſuagio, quod fuit ejuſdem* R. *in* H. *licet caſtrum non ſit nec dos ei aſſignata fuerit, violenter ejecit, et ipſam eſtoverium ſuum de bonis eorundem communibus percipere non permittit, in ipſius* B. *damnum non modicum et gravamen, et contra tenorem cartæ prædictæ, et quia præfatæ* B. *injuriari nolumus in hâc parte: vobis mandamus quod vocatis coram vobis partibus prædictis, et auditis hinc inde earum rationibus, eidem* B. *plenam et celerem juſtitiam inde fieri faciatis juxta tenorem cartæ prædictæ: ne pro defectu juſtitiæ querela ad nos perveniat iterata,* T. *&c.*

That a Woman may have her Quarentine, and her reaſonable Eſtovers in common.

'THE King, to the Sheriff, *&c.* or to 'his Bailiffs of *S.* Greeting. We under- 'ſtand from the Plaint of *B.* who was 'Wife of *R.* that whereas it is contained 'in the great Charter of the Liberties of '*England*, * that Widows may reſide for 'forty Days after the Death of their ſaid 'Huſbauds, in the capital Meſſuage of 'their Huſbands, unleſs the Meſſuages

* *Magna Charta*, 9 *Hen.* 3. *chap.* 7. *See* 2 *Inſt. p.* 16. *Stat. Merton*, 20 *Hen.* 3. *Chap* 1. *See* 2 *Inſt. p.* 79. *Co. Lit.* 32. *C. F. N. B.* 161.

'be Caſtles, within which Time their 'Dowers are to be aſſigned them; and 'that in the mean time, they may have 'reaſonable Eſtovers of their Goods: *I* 'of *C.* with Violence ejected *B.* imme-'diately after the Death of the aforeſaid *R.* 'her Huſband, from the capital Meſſuage, 'which belonged to the ſaid *R.* in *H.* 'tho' it was no Caſtle, and tho' no Dower 'had been aſſigned her, and does not 'ſuffer her to take her Eſtover out of the 'common Goods, to *B*'s no ſmall Da-'mage and Grievance, and contrary to 'the Tenor of the aforeſaid Charter, and 'becauſe we will not have the aforeſaid '*B.* injured in this Behalf: We com-'mand you, that having ſummoned be-'fore you the Parties aforeſaid, and hav-'ing heard their Reaſons thereupon, you 'cauſe full and ſpeedy Juſtice herein to 'be done the ſaid *B.* according to the 'Tenor of the aforeſaid Charter: That 'a ſecond Plaint come not to us for 'want of Juſtice. Witneſs, *&c.*'

And upon that Writ, the Sheriff ſhall award Proceſs againſt the Party, to come and anſwer the ſame, and ſhall not ſtay until the County Court be holden; for this Writ is a Commiſſion unto him, and upon the ſame he ſhall immediately make Pro-

Proceſs againſt the Party, to anſwer, *&c.* within two or three Days, according to his Diſcretion; and thereupon to proceed as Juſtice ſhould do upon a Commiſſion of *Oyer and Terminer*, &c.

DOWER * UNDE NIHIL HABET.

A WRIT of Dower * *unde nihil habet*, lieth in a Caſe where a Woman taketh an Huſband, who is ſole ſeized of Lands or Tenements, to him and his Heirs, in Fee-ſimple, or to him and the Heirs of his Body; or if the Huſband, during the Marriage betwixt him and his Wife, be ſolely ſeized in Fee-ſimple, or in Fee-tail of ſuch Eſtate, that the Iſſue begotten between him and his Wife, may inherit the ſame; then, if the Huſband doth alien the ſame, or dieth ſeized thereof, or be thereof diſeiſed and dieth, his Wife ſhall have a Writ of Dower * *unde nihil habet*, againſt him who is Tenant of the Freehold of the Land, or againſt him who is Guardian in Knight Service of the Lands; and the Form of the Writ is thus:

Rex, vicecomiti ſalutem. Præcipe A. *quod, &c. reddat* B. *quæ fuit uxor* C. *rationabilem* De dote unde nihil habet. Reg. 170.

* *Whereof ſhe hath nothing.*

tionabilem dotem ſuam, quæ eam contingit de libero tenemento quod fuit prædicti C. *quondam viri ſui in* N. *unde nihil habet ut dicit, et unde queritur quod prædictus* A. *ei deforciat, et niſi, &c. tunc ſummoneas bonos ſummonitores prædictum* A. *quod ſit, &c.*

Of Dower whereof ſhe hath nothing.

'THE King, to the Sheriff, Greeting. 'Command *A.* that, *&c.* he render to 'B. who was the Wife of *C.* her reaſon-'able Dower, which *belongs* to her, of the 'Freehold which was the aforeſaid *C*'s, 'formerly her Huſband in *N.* of which 'ſhe has nothing as ſhe ſays, and from 'which ſhe complains, that the aforeſaid '*A.* deforces her; and unleſs, *&c.* than 'ſummon by good Summoners the afore-'ſaid *A.* that he be, *&c.*'

Note, altho' the Writ be conditional, * *niſi fecerit, tunc ſummoneas*, yet the Demandant is not bound to accept the tender in *Pais*; for then ſhe ſhould loſe her Damages for the Time paſt; nor is the Tenant bound to tender it there, and yet he may plead in the *Common Pleas*, † *touts temps priſt.* 11 *H.* 4. 62. 11 *H.* 4. 40. 41.

IT is plain that the Wife can't have Damages but from the Time of her Demand, becauſe the Tenant of the Land can't

* *Unleſs he ſhall make, then ſummon.*
† *Always ready.*

can't ſet out the Dower, till the Feme be there to accept it; for ſhe muſt be there to accept it, or elſe there can be no ſetting out of the Dower; and therefore, when the Writ of Dower comes to him, he's not bound to ſet out the Dower, becauſe the Dowreſs is not with the Sheriff to accept it; indeed, if ſhe comes with the Sheriff, it will make a Demand in *Pais*, from thence to recover her Damages, in the ſame Manner as if ſhe had made her Requeſt before the Writ brought; but if ſhe has not made ſuch Demands *in Pais*, the Tenant may plead * *touts temps priſt*, ſince, as it is ſaid, he is intitled to the Profits till Default; but he can't plead * *touts temps priſt* againſt her after an Eſſoin Caſt; becauſe by that his Delay appears on Record.

AND againſt the Guardian the Writ is ſuch:

Præcipe T. *cuſtodi terræ & hæredis* I. *vel cuſtodi terræ hæredis* I. *quod &c. reddat* B. *quæ fuit uxor* C. *&c.* † Verſus cuſtodem. Reg. 170. b.

COMMAND *T.* Guardian of the Land, and Heir of *I.* or Guardian of the Heir of *I.* that Againſt a Guardian.

* *Always ready.*

† *Iſta forma tenet ſive ſit cuſtodia totius terræ ſive partis* c. *Reg. ibid.*

'*I.* that, *&c.* he renders *B.* the Wife of '*C. &c.**

Note, 13 *E.* 3. *Brev.* 242. If he be Guardian of the Land and Body, he ought to be named ſo in the Writ, otherwiſe it ſhall abate, 18 *E.* 2 *Brev.* 832.

BECAUSE if the Dowreſs don't name him Guardian of both in the Writ, ſhe don't intitle herſelf to the action againſt him; for he is not to ſet out Dower for her, but as Guardian of the Infant. And Note; ſhe ought to make him Heir by the Writ to him that was laſt ſeized, 11 *E.* 3. *Brev.* 471. becauſe, if the Writ be brought againſt the Heir of the Aſſignee of the Huſband, unleſs ſhe ſhews that the Tenant is Heir to the Perſon who was laſt ſeized, ſhe don't intitle herſelf to an Aſſignment from him; otherwiſe where the Wife is endowed † *ad oſtium eccleſiæ*, it is thus:

De dote aſſignata ad oſtium eccleſiæ. Reg. 170. b.

Præcipe T. *quod, &c. reddat* B. *quæ fuit uxor* C. *decem acras terræ cum pertinentiis in* N. *de quibus prædictus* C. *quondam vir ipſius* B. *eam dotavit ad oſtium eccleſiæ quando*

* *This Form holds whether it be a Guardianſhip of all the Land, or Part.*

† *At the Church Door.*

quando eam desponsavit, unde nihil habet ut dicit, & unde, &c.

Nota, *Que le registre ne done mye* justicies *de dower, mes la ou la femme est endowe al huys de l'egliſe, et* ideo quære *ſi touts auters briefes de dowers poent eſtre pledes en countie on fors cel ſolement, &c. Reg. ibid.*

Of Dower aſſign'd at the Church Door.

'COMMAND *T.* that, *&c.* he render to *B.* who was the Wife of *C.* ten Acres of Land with the Appurtenances in *N.* of which the aforeſaid *C.* formerly *B's* Huſband, endowed her at the Church Door, when he eſpouſed her, of which ſhe has nothing as ſhe ſays, and therefore, *&c.*

Note, That the Regiſter does not give a *Juſticies* of Dower, but where the Wife is endowed at the Door of the Church, and therefore, *quere* whether all other Writs of Dower can be pleaded in the County, or out of it only, *&c.*

AND if ſhe be endowed * *de aſſenſu patris*, then thus.

De aſſenſu patris ad oſtium eccleſiæ. Reg. 170. b.

Præcipe A. *quod reddat* B. *quæ fuit uxor* C. 100 *acras terræ cum pertinentiis in* N. *de quibus prædictus* C. *fil. & hæres ipſius* A. *quondam vir ipſius* B. *de aſſenſu &*

* *With the Father's Aſſent.*

& voluntate prædicti A. *patris ſui, eam dotavit ad oſtium eccleſiæ quando eam, &c.*

Of the Father's Aſſent at the Church Door.

'COMMAND *A.* that he render to *B.* 'who was the Wife of *C.* an hundred 'Acres of Land, with the Appurtenances 'in *N.* of which the aforeſaid *B.* Son 'and Heir of *A.* formerly Huſband of '*B.* endowed her at the Church Door, 'when, *&c.* with the Aſſent and Will 'of the aforeſaid *A.* his Father."

AND the Writ of Dower * *unde nil habet*, may be ſued in the County before the Sheriff by a *Juſticies*; and a Wife ſhall be indowed of Advowſons, Villains, Commons of Paſture, and of other Profits and Liberties of which her Huſband had any Eſtate of Inheritance, which Eſtate, the Iſſue betwixt them, by poſſibility may inherit, *&c.*

AND the Wife may ſue a Writ of Dower of Lands or Tenements in *London*; and the Writ ſhall be directed unto the Mayor and Sheriffs of *London*, and the Writ ſhall be thus.

De Dote in *London.* Reg. 170. b.

Rex, majori vel cuſtodi & vice-comitibus London, *ſalutem. Præcipimus vobis quod juſtitietis* A. *quod juſte & ſine dilatione*

* *Whereof ſhe has nothing.*

tione & ſecundum conſuetudinem civitatis noſtræ London, *reddat* B. *quæ fuit rationabilem dotem ſuam, quæ eam contingit, &c. in* London, *& juſtitietis* D. *quod juſté & ſine, &c. ſecundum conſuetudinem, &c. reddat eidem* B. *rationabilem dotem ſuam, &c. in eâdem civitate, unde nihil habet, ut dicit, & unde queritur quod prædicti* A. *&* D. *ei deforciant ſicut rationabiliter monſtrare poterit, quod ei reddere debeant, ne amplius inde clamorem audiamus pro defectu juſtitiæ* T. *&c.*

Of Dower in *London.*

'THE King, to the Mayor or Guardian, and Sheriffs of *London*, Greeting. 'We command you that you ſummon '*A.* that juſtly and without delay, and 'according to the Cuſtom of our City 'of *London*, he render to *B.* who was 'Wife of *C.* her reaſonable Dower, 'which *belongs* to her, *&c.* in *London*, 'and that you ſummon D. that juſtly 'and without, *&c.* according to the 'Cuſtom, *&c.* he render unto the ſame '*B.* her reaſonable Dower, *&c.* in the 'ſame City, of which ſhe has nothing, as 'ſhe ſays, and whereupon ſhe complains 'that the aforeſaid *A.* and *D.* deforce 'her, as ſhe can reaſonably ſhew, they 'ought to render her; that we hear no

'more

'more Claim hereof, for want of Juſtice.
'Witneſs, *&c.*"

AND by that it appeareth, that a Woman ſhall have a Writ of Dower in *London* againſt ſeveral Tenants, by ſeveral Juſtices in the Writ, as well as ſhe ſhall have a Writ of Dower againſt ſeveral Tenants by ſeveral *Precipes*, and all in one Writ and the Proceſs is Summons, *Grand Cape*, and *Petit Cape* in the *Common Pleas*. *A.* brought Dower againſt *B.* * *de libero tenemento in C.* and *D.* and *B*, appeared, and before Plaint made, ſhe brought another Writ in the ſame Ville; this Writ ſhall abate, although no Plaint was made before; for by *Shard*, one ſhall not have two Writs of Dower †*unde nil habet* againſt the Tenant, in the ſame Ville, if it be not upon ſpecial Matter; as if the Tenant purchaſe other Lands after the firſt Writ, whereof ſhe is Dowable. 11 *E.* 3. *Brev.* 476. otherwiſe it is of an Aſſize, 39 H. 6. 12.

THE Writ of Dower being returnable before the ‡ *Juſticiarii reſidentes*, the firſt Writ is depending at the Time of the ſecond Writ purchaſed; and therefore it may be pleaded in Bar thereof, if they both relate to the ſame Lands; but in the

* *Of Freehold.* † *Whereof ſhe has nothing.*
‡ *Juſtices reſident.*

the Caſe of the *Aſſize*, if the firſt Writ never be returned before the * *Juſticiarii Itinerantes*, the Commiſſion is at an End; and a ſecond Writ may be brought at the next *Aſſizes*, ſince the firſt Writ cannot be ſaid to be pending.

Of Admeasurement of Dower.

The Writ of *Admeaſurement of Dower* lieth where the Heir, when he is within Age, endoweth the Wife of more than ſhe ought to have Dower of, or if the Guardian endow the Wife of more than the third Part of the Land of which ſhe ought to have Dower, then the Heir at his full Age may ſue this Writ againſt the Wife; and thereby ſhe ſhall be admeaſured, and the Surpluſage which ſhe had in Dower, ſhall be reſtored to the Heir; but in ſuch Caſe, there ſhall not be aſſigned anew any Lands to hold in Dower, but to take from her ſo much of the Land, as amounteth above the third Part of all the Land which ſhe ought to be endowed; and he need not ſet forth of whoſe Aſſignment ſhe holds, 17 *E.* 3. 66. a View is not grantable on this Writ. 17 *E.* 3. 67. contrary adjudged, 78 *E.* 3. 20. And it ſeems that the Heir within age ſhall have an Admeaſurement of Dower of his own Aſſignment,

7 *E.*

* *Juſtices itinerant.*

7 E. 3. Admeaſurement *B.* but if the Heir at full Age aſſigns Dower, he ſhall not have this Writ againſt his own Aſſignment, 6 *H.* 3. *Admeaſurement* 18.

AND if the Heir within Age, before the Guardian enter into the Land, do aſſign to the Wife more Land in Dower than ſhe ought to have, then the Guardian ſhall have the Writ of Admeaſurement againſt the Wife, by the Statute of *Weſtmin.* 2. *Cap.* 7. and if the Guardian bring the Writ, and do purſue it againſt the Wife, yet the Heir at his full Age, by the ſame Statute, ſhall have the Writ of Admeaſurement of Dower againſt the Wife; and the Writ is Vicountiel, and ſhall be ſued in the County before the Sheriff, and the Writ is thus.

13 Ed. 2 Inſt. 367.

De Admenſuratione Dotis pro Hærede, W. 2. c. 7. Reg. 171.

Rex, vice-comiti ſalutem. Queſtus eſt nobis A. *filius & hæres* B. *vel conſanguineus & hæres* B. *quod* C. *quæ fuit uxor prædicti* B. *plus habet in dotem de libero tenemento quod fuit prædicti* B. *quondam viri ſui in* N. *quam habere debet, & ad ipſam pertinet habendum, & ideo tibi præcipimus quod juſte & ſine dilatione admenſurari facias dotem illam, ita quod prædicta* C. *non habeat plus in dotem de hæreditate prædicti* A. *quam habere debet & ad ipſam pertinet habend' ſecundum rationabilem*

abilem dotem ſuam; & quod prædictus A. *habeat de dote illâ id quod habere debet, & ad ipſam pertinet habend. ne amplius inde clamorem aud. pro defectu recti,* T. *&c.*

Of Admeaſurement for the Heir.

* ‘ The King, to the Sheriff, Greeting. ‘ *A.* Son and Heir of *B.* or Kinſman, ‘ and Heir of *B.* has complained to us, ‘ that *C.* who was the Wife of the afore- ‘ ſaid *B.* has more in Dower of the ‘ Freehold, which belonged to the afore- ‘ ſaid *B.* formerly her Huſband in *N.* ‘ than ſhe ought to have, and behooves ‘ her to have; and therefore We com- ‘ mand you, that juſtly and without de- ‘ lay you cauſe the Dower to be ad- ‘ meaſured, ſo that the aforeſaid *C.* have ‘ no more Dower than ſhe ought to have, ‘ and belongs to her to have, according to ‘ her reaſonable Dower; and that the ‘ aforeſaid *C.* have that Dower, what ſhe ‘ ought to have and belongs to her to ‘ have; that we hear no more Claim ‘ hereof for want of Right. Witneſs, *&c.*

The Writ of Admeaſurement lies upon the Aſſignment of Dower, by the Heir within Age, or his Guardian; becauſe any act of ſuch Heir within Age, cannot intitle her to more than is due by the Law, and by Conſequence a Writ of Ad-

* *Stat. Weſtm. 2. or 13 Edw. Chap. 7. ſee 2 Inſt.* 367.

Admeaſurement muſt lie, and there was no view in this Writ; becauſe it proceeded upon a Suppoſition that it had been viewed, and found to be more than a third Part; and therefore to have allowed a View afterwards, in order to ſee ſuch an Error, was to ſuppoſe that the Writ had originally no Foundation; and it was Vicountiel, becauſe it was preſumed that the firſt Aſſignment was in the Court of the Heir; and if there was any Miſtake there, it was to be rectified in the Court of the Sheriff, *ſee* 13 *E.* 3. Admeaſurement 17. Yet *Bracton* ſays, if ſhe hath Lands in Dower in diverſe Counties, there it ought to be **Coram Juſticiariis*; and Note, there the Tenant ſhall have ſeveral Writs.

Note firſt, in every Writ of Admeaſurement, all the Land which he hath in the ſame County, ſhall be named and admeaſured.

2dly. If he hath Lands in ſeveral Counties, there ſhall be ſeveral Writs, and ſeveral Extents of the whole Land, whereof the Party died ſeiſed; and it ſeems he may have one Count and one Admeaſurement, *Quere*, how it ſhall be made, 13 *E.* 4. Admeaſurement 17. yet note 7 *R.* 2, *ibid.* 4. the Defendant was put to anſwer, notwithſtanding this Exception.

* *Before the Juſtices.*

ception. The Reaſon why the Writs muſt be * *Coram Juſticiariis*, where the Lands are in ſeveral Counties, is becauſe the Sheriffs of two Counties, cannot ſet out a perfect Dower; for they cannot meet out of their Counties in order to do it; and the Dower might be right in the whole, though it was out of Proportion in one of the Counties; therefore there is no collecting Dower ſet out in two Counties, nor conſidering it whether juſt or not, but only by conſidering it * *Coram Juſticiariis*; but the Tenants muſt have ſeveral Writs, becauſe an Inqueſt muſt be taken before the Juſtices in ſeveral Counties; but though there be ſeveral Writs, yet the Count muſt be upon them all, becauſe the Queſtion before the Court, is touching the Aſſignment of the Dower, which is one entire Thing; and therefore the Judgment muſt be of the Aſſignment upon all the Writs, though the Inqueſt muſt be ſeveral upon each of them. It ſeems the Inqueſts muſt be taken in every County where the Defendant is dowable, of how much more or leſs then a Third is aſſigned in every County; and upon comparing all the Inqueſts returned, the Juſtices are to give Judgment, that the Heir ſhould recover

* *Before the Juſtices.*

thoſe Acres that were over-aſſigned; and by conſequence of that Judgment, the Defendant will hold the reſt as a reaſonable Dower.

And, it ſeems, that in the *Count*, the Concluſion is, * *et inde producit ſectam, & petit admenſurationem, &c.* as in the Count of Admeaſurement of Paſture; and if the Dowreſs can plead nothing in Bar of the Admeaſurement, her Manner of Pleading is † *ven. & defend. vim & injur. quando, &c. & bene concedit admenſur. præd. fieri, &c. ideo præceptum eſt vic.* (of the reſpective Counties) *Quod aſſumpt. ſecum 12 lib. & legal. hominibus, &c. per quos, &c. qui nec, &c. in propriâ perſonâ ſuâ accedat ad præd. terr. admenſurandum, & quod per eorum Sacrament. admenſurari fac. terr. illam ita quod prædict.* (the Defendant) *non habeat in eâ plus in dotem ſuam quam habere debeat, &c. ad ipſam pertinet habend. ſecundum rationabilem dotem ſuam & admenſurationem*

* *And hereof produceth Suit, and deſires an Admeaſurement, &c.*

† *Comes and defends the Force and Injury, when, &c. and well grants the Admeaſurement aforeſaid, to be made, &c. therefore the Sheriff (of the reſpective Counties) is commanded, that taking with him twelve free and lawful Men, &c. by whom, &c. who neither, &c. to go in his own proper Perſon to meaſure the aforeſaid Land, and that the Land be meaſured by their Oath, ſo that (the Defendant) aforeſaid has not in it more for her Dower, than ſhe ought to have, and belongs to her to have, according to her reaſonable Dower, and the Admeaſurement which, &c. you cauſe to be made known here ſuch a Day, under Seal, &c. and Seals, &c.*

tionem quam, &c. Scire facias, hic tali die ſub ſigillo, &c. & ſigillis, &c. When the Writ is returned, it is entered up in this Manner:

* *Per quod præd. Vice-comes ad tunc & ibidem admenſurari fecit terr. illam tam per diſcretionem ſuam præd. quam per Sacrament. prob. & legal. hom. com. præd. ad hoc jurat. qui dicunt ſuper Sacram. ſuum quod in vill. de H. 10. acr. terr. ſunt aſſignat. præd.* (the Defendant) *plus quam illa habere debeat & plus quam ad ipſam petinet habend. ſecundum rationabil. dotem ſuam.* And then the Judgment is, that (the Plaintiff) † *recuperet præd. 10. acr. terr.* and where the Lands are in ſeveral Counties, there are ſeveral Inqueſts, and one entire Judgment, for the Number of the overplus Acres are contained in all the Inqueſt. *Raſtal's Entries, Admeaſurement de Paſture, fo.* 23. And for the Guardian, the Writ is.

Queſtus eſt nobis A. *cuſtos terræ & heredis* B. *quod* C. *quæ fuit uxor prædicti* B. *plus*

De Admenſuratione Dotis pro Cuſtode. Reg. 171.

* *Whereupon the aforeſaid Sheriff, then and there cauſed the Land to be meaſured, as well by his Diſcretion as by the Oaths of good and lawful Men of the County aforeſaid, hereto ſworn, who ſay upon their Oaths aforeſaid, that ten Acres of Land in the Town of* H. *are aſſigned to the aforeſaid, (the Defendant) more than ſhe ought to have, and more than belongs to her to have, according to her reaſonable Dower.*

† *Recover the aforeſaid ten Acres of Land.*

plus habet in dotem, &c. (uſque ibi.) *ita quod prædicta* C. *non habeat plus in dotem de hæreditate prædicti hæredis quam habere debet, &c. et quod prædictus cuſtos habeat de dote illâ, &c. ne amplius inde, &c.*

Of Admeaſurement of Dower for a Guardian.

'*A.* the Guardian of the Land, and 'Heir of *B.* has complained to us that *C.* 'who was the Wife of the aforeſaid *B.* 'has more Dower, *&c.* (*down to*) ſo 'that the aforeſaid *C.* have not more 'Dower of the Inheritance of the afore-'ſaid Heir, than ſhe ought to have, *&c.* 'and that the aforeſaid Guardian have of 'that Dower, *&c.* that no more here-'of, *&c.*'

And when the Plea is in the County, the Plaintiff may remove it without any Cauſe ſet forth in the Writ, and the Defendant may likewiſe remove it without any Cauſe in the Writ as in Replevin. And if the Writ be removed into the *Common Pleas*, by a *Pone*, and Proceſs be awarded againſt the Defendant, according to the Statute, which is Summons, Attachments, and Diſtreſs, *&c.* then the Sheriff cannot make the Admeaſurement, but muſt extend all the Lands particularly, and return the ſame into the *Common Pleas*; and thereupon the Admeaſure-

ment ſhall be made by the Juſtices.— And if the Guardian aſſign for Dower more than ſhe ought to have, and afterwards grants over his Eſtate, his Aſſignee ſhall not have a Writ of Admeaſurement. *Note*, theſe following Points are well reſolved.

FIRST, if the Guardian aſſign Dower, and grants over the Ward, the Grantee ſhall not have Admeaſurement.

SECONDLY, if the Anceſtor aſſigns Dower, and dies, the Guardian of his Heir ſhall never have Admeaſurement, but his Heir ſhall have it; but this ſeems to be in Caſe where the Anceſtor was within Age at the Time of the Aſſignment.

THIRDLY, where the King ſeizes a Ward, to which he hath no Right, the Guardian ſues an *Ouſter le maine*, and has it **ſalvâ Dote*, it ſeems in this Caſe, the Guardian ſhall have Admeaſurement; otherwiſe it is of the Aſſignee or Grantee of the King. 7 *R.* 2. *Admeaſurement* 4. *Note* there alſo, if the Deſſeiſor endow the Wife of more than a third Part, the Heir ſhall have an *Aſſize*.

THE Reaſon is, becauſe the Grantee comes in under the Guardian, and therefore is bound by his Acts; but if the Heir be of full Age, and aſſigns Dower,

* *Saving Dower.*

and dies, his Heir ſhall have no Writ of Admeaſurement, though he aſſigns too much, becauſe he is bound by the Act of his Anceſtor; but if the Heir be within Age, and aſſigns Dower, and dies, his Heir being of full Age, he ſhall have a Writ of Admeaſurement, becauſe his Anceſtor was not bound by his Act during the Minority; but if the Heir be within Age, when he aſſigns Dower, and dies, leaving an Heir within Age, ſuch Heir ſhall have an Admeaſurement when he comes of full Age, when he may be thereby bound, and the Guardian ſhall not have a new Admeaſurement during Minority, becauſe he muſt take the Eſtate in the Condition the Anceſtor left it, though ſuch Aſſignment of the Anceſtor was to the Prejudice of the Guardian. And if a Diſſeiſor endows the Wife of more than a third Part, the Heir ſhall have an Aſſize, becauſe he had no right to aſſign Dower, and therefore the Wife does not come in under a Perſon who had Power to make an Aſſignment, as to that Part which is more than her Dower; ſo in that, ſhe is looked upon as a Diſſeiſor; and by conſequence the Heir may have an Aſſize.—And ſo if the Heir within Age aſſigns unto the Wife more in Dower then ſhe ought to have, *&c.*

the

the Guardian in Right may have a Writ of Admeaſurement; but if he grants over his Eſtate, his Aſſignee, who is Guardian in fact, ſhall not have the Writ, becauſe it was a thing in Account given to his Leſſor, *&c.* and the Heir ſhall have a Writ of Admeaſurement of Dower, for Dower aſſigned in the Time of his Anceſtor: *this ſeems to be*, if the Anceſtor was within Age at the Time.

And if a Woman be endowed in *Chancery* by the King, the Heir ſhall have a Writ of Admeaſurement againſt her, if ſhe has more aſſigned unto her for Dower than ſhe ought to have; if upon Recovery of the third Part in Dower, the Sheriff aſſigns a Moiety, the Tenant hath no Remedy againſt the Sheriff by *Aſſize*, but he may have a *Scire facias* to aſſign Dower *de novo*. 22 *R.* 2. *Execution* 165. *vide* 21 *H.* 7. 129. Dower aſſigned by the Infant, more than was neceſſary, ſhall not be avoided by Entry; *ſee* 10 *E.* 3. 31. Dower ſhall not be admeaſured by a Writ of Dower 19 *E.* 3. *Quare Impedit*, 154.

The Reaſon is, when the Feme recovers Dower, and the Sheriff aſſigns it by Award of the Court, and by Inqueſt of twelve Men, the Sheriff is no wrongdoer, though he aſſigns more than her

Share, ſo that the Heir can have no *Aſſize* againſt him, but he muſt apply himſelf to the Court for a new Inqueſt; and therefore muſt call in the Tenant in Dower by *Scire facias*; and when the Heir aſſigns Dower during his Minority, more than is neceſſary, he cannot at his full Age avoid it by Entry, becauſe Part is well aſſigned, ſince ſhe was intitled to ſome Dower, and conſequently he cannot avoid it but as to the Overplus, and ſuch Overplus cannot be diſtinguiſhed till it is admeaſured. 2dly, This Aſſignment was ſuppoſed to be done with the Approbation of the *Pares* of the Heir's Court, and ſo could not be avoided without an Inqueſt; but if the Wife brings a Writ of Dower, and the Dower be ſet out under the Direction of the Court, the Heir ſhall not have Admeaſurement, when he comes of full Age, becauſe it is ſuppoſed the Court will take care of the Intereſt of the Infant; therefore the Act of the Court cannot be impeached, though the Wife had thereby more than ſhe ought. *Quere* whether the Heir may not have a *Scire facias*, if the Sheriff has ſet out more than he ought? And if the Guardian do aſſign Dower more than ſhe ought to have, the Heir during his Nonage ſhall not have a Writ of Admeaſurement; but if

if he himſelf aſſign more for Dower than ſhe ought to have, *&c.* then it ſeems reaſonable that he himſelf, during his Nonage, may have the Writ of Admeaſurement of Dower. *Yet quere.*

But if the Wife, after the Aſſignment of Dower, do improve the Land, and make it better than it was at the Time of the Aſſignment, an Admeaſurement doth not lie of that Improvement, 14 *H.* 3. *Admt.* 10. 13 *E.* 1. *ibid.* 17. but if the Improvement be by Caſualty, of a Mine of Coals, or of Lead, which are in the Land, *&c.* which have been occupied in the Huſband's Time, the Doubt is the more; but ſhe cannot dig new Mines, for that ſhall be Waſte.

The Diſtinction, touching the Mines ſeems to be this, that where a Mine is not open, ſhe cannot work it at all, becauſe it will be Waſte; if it be open, and in work, it ſeems to be only a caſual Profit; and a caſual Profit ſhall not avoid an Aſſignment, or be ſo admeaſured as to vacate it, ſince it is not certain to continue during the Life of the Dowreſs; and therefore not to be computed into the Value of that Part which ſhe poſſeſſes, unleſs the Value was coextenſive with the Eſtate which ſhe is to have in it; and if the Anceſtor dieth ſeized, and the 5 Co. 12.

Huſband

Huſband die before he entreth into the Land, yet the Wife ſhall be endowed, although her Huſband had but a Poſſeſſion in Law.

But a Man ſhall not be Tenant by the Courteſy of the Wife's Land, if his Wife had not a Poſſeſſion in Deed; if it be not in ſpecial Caſes, as of an Advowſon of Rent, where ſhe dieth before the Day of Payment of the Rent. And if in caſe the King's Tenant die ſeized, and the Heir die before he enter, then the Wife ſhall be endowed: But if the Heir enters, and intrudes upon the King's Poſſeſſion, and afterwards dies before he ſueth his Livery, the Wife ſhall not be endowed by the Statute * *de Prerogativa Regis C.* 12. which is, that if the Heir intrudes upon the King's Poſſeſſion, that † *nullum accreſcit ei liberum tenementum.*

When a Woman taketh a Leaſe for Years of Land, ſhe ſhall not be endowed of the ſame Land during the Term; accordingly, where the Wife takes the Commitment of Wardſhip from the Grant of the King, without any Exception of Dower, ſhe ſhall be barr'd of Dower during the Nonage of the Heir, 6 *H.* 4. 7. but if the Baron be attainted and dies, and the Wife takes a Leaſe for Years of the

* *Of the King's Prerogative.*
† *No Freehold accrued to him.*

the Lands from the Grant of the King, the Heir of the Huſband being alſo in Ward of the King for the Tenements that were entailed; and afterwards by Act of Parliament, or by Reverſal of the Judgment, the Heir is reſtored, now ſhe ſhall have her Dower; for that the Leaſe was made before her Title of Dower commenced: So, if *A.* makes a Leaſe to a Feme for Years, and afterwards they intermarry, *A.* dies within the Term, *B.* his Wife ſhall be endowed, 6 *H.* 4. 7. 8. Sir *John Cornwallis*'s Caſe, *Dy.* 76. Feme Tenant at Will may bring Dower of the ſame Lands.

The Reaſon of this Caſe is, becauſe, when the Wife takes the Term, or has a Term in the Lands by her own Act, ſhe agrees to hold it under the Reſervation of the Rent; therefore ſhe can't afterwards recover a Freehold in that Eſtate, which could make a Merger of the Term as to the 3d Part; and by Conſequence take away the Security which the Heir had for his Rent, ſince he could not afterwards diſtrain in that 3d Part; and therefore ſuch Term will be a Bar to the Wife's recovering Dower in that Land, ſince ſhe hath covenanted with the Heir to hold of him in another manner; but tho' the Wife were Tenant at Will, ſhe may

bring Dower, becauſe the bringing of the Writ is a Determination of the Will.

And where the Eſtate which the Huſband hath, during the Marriage, is ended, there the Wife ſhall loſe her Dower. As if Tenant in Tail do diſcontinue in Fee, and afterwards taketh a Wife, and deſſeiſeth the Diſcontinuee, or the Diſcontinuee doth enfeoffe him, and afterwards the Tenant in Tail dieth ſeiſed, and his Heir entreth, the Heir is remitted unto the Title which his Anceſtors had, the Huſband's Wife ſhall loſe her Dower, for that Eſtate which the Huſband had is determined; for that was an Eſtate in Fee, by Wrong, and the Heir hath the Eſtate in Fee which his Anceſtor had by Right, according to this Diverſity: ſee 10 *E.* 3. *C.* 27.

If a Man maketh a Gift in Tail, reſerving Rent to him and his Heirs, and afterwards the Donor hath a Wife, and the Tenant in Tail dieth without Iſſue, the Wife of the Donor ſhall not be endowed of the Rent, becauſe the Rent is extinct; for it was reſerved on the Eſtate Tail, which is ended; but altho' that the Tenant in Tail dieth without Iſſue, yet his Wife ſhall be endowed, becauſe the Land continueth, and is not determined, as the Rent is. *N. B.* If a Rent be granted

granted to *I. S.* and his Heirs, upon Condition, that if the Grantee, or his Heirs, be within Age, the Rent ſhall ceaſe during their Nonage, the Wife ſhall recover Dower of this Rent againſt the Tenant; but * *ceſſat executio* during the Nonage, 12 *E.* 3. *Condition.* 12 *Perkins, fo.* 65. *placito* 227.

If the Grandfather dies ſeized, and after the Father dieth ſeized, and the Son hath the Land, and then the Wife of the Grandfather is endowed of the 3d Part of the Land, and dieth, yet the Wife of the Father ſhall not have Dower of that 3d Part, becauſe † *Dos de Dote peti non debet.*

The Dowreſs holds of the Heir; but by the Inſtitution of the Law, ſhe is in of the Eſtate of her Huſband; ſo that after the Heir's Aſſignment, ſhe holds as by an Infeudation from the immediate Death of the Huſband: hence it is, that the Dower defeats Deſcent, becauſe the Lands can't be ſaid to deſcend as Demeſne, which are in Tenure, and the Aſſignment of the Dower being in Nature of an Infeudation, taking place immediately from the Death of the Huſband, there are only two Thirds which deſcend as Demeſne; hence the Maxim aroſe,

* *Execution ceaſes*

† *Dower ſhould not be demanded of Dower.*

aroſe, that there could not be * *Dos de Dote*; for if there were Grandfather, Father, and Son, and the Grandfather died, and Grandmother was endowed, and held her Dower during the Life of the Father, the Mother was not intitled to be endowed of a 3d Part of that Third, becauſe it was in the Tenure of the Grandmother, during the Life of the Father, and he was never ſeized of it—But if the Grandmother had died, during the Life of the Father, the Mother ſhould be endowed; becauſe the Tenure of the Dowreſs's Grandmother was determined, and ſo it was Demeſne in the Life of the Father; ſo if the Grandfather had enfeoffed the Father, and died, and the Grandmother had recovered Dower of the Father, and then the Father had died, the Mother ſhould be endowed, not only of the Eſtate in Poſſeſſion, but of one Third in Reverſion of that Part which the Grandmother held in Dower, becauſe the actual Seiſin of the Father by the Feoffment, was before the Tenure of the Grandmother took place upon the Eſtate, though the Title to ſuch Tenure was precedent; therefore the Title of the Grandmother does not avoid the Seiſin of the Father, which he obtained by the precedent Livery, but only burthens it with

* *Dower out of Dower.*

with an Eſtate for Life; ſo that the Seiſin of the Father in this Caſe, being not defeated by the Tenure of the Grandmother, as it was in the former Caſe; ſuch Seiſin muſt therefore be eſteemed to have continued during the Life of the Father, and conſequently the Mother has a Right to be endowed thereof, as of all other Things of which the Father was ſeized during the Coverture; and from this Notion it is clear, that if Tenant in Tail diſcontinues, and after takes a Wife, and diſſeiſes the Diſcontinuee, and dies, his Wife ſhall not be endowed, becauſe her Tenure muſt ariſe out of the Eſtate gained by Deſſeiſin, and by Conſequence, ſuch Tenure is defeated by the Remitter; for ſhe can't hold of the Heir, as by Infeudation of that Eſtate which he has not in him.

If the Huſband be Tenant in Common with two others, in Fee of certain Lands, and dieth, his Wife ſhall be endowed of the 3d Part of that Land only, by Metes and Bounds to hold in common, *&c.*

It is to be holden by Metes and Bounds as to the Heir, and ſhe muſt ſtock the Land in Proportion to a third Part of a Moiety; but as to the other Moiety, ſhe muſt ſtill hold in common with the other Te-

Tenants. Dower muſt always be in Severalty by Metes and Bounds as to the Heir; becauſe it is a Tenure of the Heir, and therefore muſt be divided from his Demeſne.

And if a Wife be endowed of a Mill, or of an Office, ſhe ſhall have the 3d Part of the Profits thereof aſſigned unto her, and ſhe ſhall have a Freehold in the 3d Part of the Mill, *&c. M.* 45. *E.* 3.

A Woman of the Age of nine Years or more, at the Death of her Huſband, ſhall have Dower of his Land; and if ſhe be of leſs Age at the Death of her Huſband, then ſhe ſhall not have Dower.

If a Woman be endowed, and afterwards loſeth it by Action tried; if ſhe prays in Aid of him in the Reverſion, ſhe ſhall be endowed anew of that which remaineth, *v.* 4 *E.* 3. 25. 26. 10 *E.* 3. 7. yet there ſeems this Diverſity, if a Wife be endowed by a Diſſeiſor, ſhe ſhall have the Warranty; but if the Reverſion of thoſe Lands are only granted over by the Heir, ſhe hath loſt her Warranty againſt the Grantee, 17 *E.* 3. 7. 21 *E.* 3. 48. 10 *E.* 3. * *quid juris clamat.* 41.

If the Huſband exchange Lands, *&c.* and afterwards dieth, if the Wife hath Dower of the 3d Part of the Land taken in Exchange, ſhe ſhall not have Dower of

* *What Right he claims.*

of the other Land, *&c.* which was given in Exchange.

If a Woman be Guardian in Soccage, and ſhe bring a Writ of Dower againſt a Stranger, he may plead that ſhe holdeth other Lands in Soccage, of which ſhe may endow herſelf *de la pluis belle*, and the Wife upon that may endow herſelf of thoſe Lands unto the Value of the 3d Part, which ſhe ought to have of the other Lands which the Guardian holdeth, *&c.*

And whether ſhe may endow herſelf *de la pluis belle*, unto the Value of the 3d Part, which ſhe ought to have of all her Huſband's Lands or no, *quere*; for ſome hold that Dower *de la pluis belle* ſhall endure but during the Minority of the Heir who is in Ward.

The Son would have endowed his Wife of a Reverſion of Land, which one held for Life, *ex aſſenſu patris*, and it was holden that it was not good, *M.* 4. *E.* 3. becauſe it was not in Poſſeſſion, whereof a Right of Dower may be claimed *. F. N. B. 334.

And the Writ of Dower, *ex aſſenſu patris*, lieth as well againſt the Guardian, as againſt the Tenant of the Freehold.

S If

* *See a Precedent of a Releaſe to a Purchaſer and his Truſtee in Wood's Body of Conveyancing, p.* 223.

If the Tenant fore-judge the Meſne, yet the Wife of the Meſne ſhall be endowed.

If a Man recovers in Value againſt the Huſband, by a *Warranty Auncestrel*, yet the Wife ſhall be endowed, becauſe the ſame is by Force of the Warranty made, and not by Reaſon of a Title Paramount to the Land.

Where the Huſband's Land is evicted by Title Paramount, the Wife cannot be endowed, becauſe the Wife cannot be intitled to an Infeudation, where the Huſband is not intitled to the Land itſelf; but if the Land be recovered by the way of Recompence in Value, either by *Homage Auncestrel*, or otherwiſe, ſuch Recompence binds the Land only from the Judgment of ſuch Land being precedently bound by the Wife's Title to the Dower, ſhe ſhall have her Dower out of the Lands recovered in Value; and if the Wife be evicted of any Part of thoſe Lands aſſigned to her for Dower, ſhe is intitled to recover in Value againſt ſuch Aſſignor of Dower, be he Deſſeiſor or Heir, becauſe it was not an Infeudation of that Third to which ſhe was intitled; but ſhe will not recover againſt the Heir's Grantee of the Reſidue of the Lands, becauſe he did not make the Infeudation, and the

Tenure

Tenure was not from him, but the Reverſion ſtill continues in the Heir; and albeit the Heir had granted the Reverſion of the 3d Part, yet ſhe could not recover againſt the Grantee, becauſe the Heir could not grant over the Reverſion without her Attornment, and ſhe is not obliged to attorn, except ſuch Grantee of the Reverſion will enter into a Warranty to defend her Eſtate; and it ſeems that the Recompence which the Wife has, is only againſt the Perſon who made the Aſſignment of Dower, and doth not attach upon any Eſtate that was not ſubject to ſuch Infeudation.

THE youngeſt Son ſhall not aſſign Dower to his Wife *ex aſſenſu patris* of the Father's Land, becauſe he is not Heir apparent.

THE Endowment *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, are particular Infeudations in the Life of the Huſband, though to take place after his Deceaſe; and therefore the Wife may enter without any Aſſignment of the Heir, or any further Specification of the Father, than what was contained in his original Deed, becauſe the Tenure was erected in the Life of the Huſband, and none can endow in this Manner but the Heir apparent, becauſe no body elſe can be certainly intitled to

the Demeſne; and therefore they can't make ſuch Sort of Infeudation out of them, nor could the Heir do it without the Aſſent of his Father, becauſe the Demeſne is in him; nor could the younger Son, in *Borough Engliſh* do it, becauſe there may be a younger; and theſe Sort of Dowers were ſo conſtituted, as to take place at all Events, either in the Life of the Father by his Aſſent, or after the Death of the Father by the Infeudation of the Huſband.

Co. Lit. 25. b.

If the Huſband enter into Religion, the Wife ſhall not have Dower during his Life; for the entring into Religion is only a Separation, and no Diſſolution of the Marriage; and if he were deraigned, he might enter upon his Eſtate again; and it ſeems, that the eccleſiaſtical Law would provide the Wife Alimony during his Life; but ſhe can't have a ſeparate Intereſt by way of Dower during the Marriage.

The Wife ſhall have a third Part of an Advowſon for her Dower. If the Wife do elope from her Huſband, and remain with the Adulterer, ſhe ſhall loſe her Dower.

By the old feudal Law, the Vaſſal, if he committed Adultery with the Lord's Wife, it was a Forfeiture of his Feud, and

and conſequently if the Wife of a Tenant committed Adultery, ſhe forfeited the Infeudation of her Dower; but the ſubſequent Laws put it upon Elopement, becauſe by that the Adultery became flagrant, and they would not allow ſecret Adulteries to be pretended after the Death of the Huſband, by which the Heir blemiſhed the Reputation of his Anceſtors.

If the Huſband be attainted of Felony by Outlawry, or otherwiſe, ſhe ſhall loſe her Dower; ſee the Common Law altered in this Caſe, 1 *E.* 6. *c.* 12. When the Huſband's Eſtate eſcheated to the Lord for Felony, or to the King for Treaſon, there was an End of the Wife's Dower, becauſe the King or Lord came in by Title Paramount, and the Eſtate of the Huſband was at an End, out of which the Infeudation was to be; ſo if the Huſband had enfeoffed any Perſon, and had committed Treaſon or Felony, ſhe could not have claimed her Dower from the Feoffee, becauſe the Feoffee, after the Death of the Huſband, held of the ſuperior Lord; and the Eſtate of the Huſband, which he had during the Coverture was forfeited; but if the Huſband had not committed the Treaſon or Felony, then ſhe might have claimed her Dower of the Feoffee; tho' ſince the Statute of

Co. Lit. 9. 41. § 55.

Quia Emptores, the Feoffee holds of the ſuperior Lord, becauſe the Marriage is conſidered as a Charge upon the Eſtate to any Perſon that comes in the *per*, as under the Conveyance of the Huſband, and therefore the Wife's Dower was conſidered as an Infeudation charged on the Eſtate of the Feoffer; but if the Huſband had committed a Forfeiture after the Feoffment, it would have worked as an Eſcheat of the Meſualty, and conſequently the Feoffee would have held of the Lord Paramount, and the Wife could not therefore have had Dower; but where there was no Forfeiture, the Meſualty had a Continuance, and then the Wife's Dower was to charge the Feoffee, as a prior Infeudation, ariſing out of the Marriage Contract. But after the Statute of *Quia Emptores*, this Diſtinction, which aroſe out of the Meſne Tenure, became obſolete, and therefore they thought, ſince the Huſband could not, by his Act of Alienation, defeat the Wife's Dower, ſo he ought not by his Act of Forfeiture; therefore, agreeable to the Stat. 1 *E.* 6. *C.* 12. was made to preſerve the Wife's Dower where the Huſband had forfeited.

If one Joint-tenant make a Feoffment of his Part, his Wife ſhall not be endowed, becauſe her Huſband was never ſole

ſole ſeized. In that Caſe of Joint-tenancy during the joint Seiſin, the Wife's Contract of Dower can never attach upon the Eſtate, becauſe the other Joint-tenant comes in by the feudal Contract, ſuperior to the Marriage Contract, ſo to the Wife's Infeudation; for though the Marriage had been prior to the Joint-tenancy, yet it will not attach upon it, becauſe the Eſtate in Joint-tenancy is ſo created, that it ſhould ſurvive * *& cujus eſt dare ejus eſt diſponere*, therefore, tho' the Marriage were precedent, yet it cannot take place upon this Infeudation; but as ſoon as the ſole Seiſin commences, the Wife of the former Companion of the Alienor, who is now become Tenant in Common with the Feoffee, ſhall be endowed.—Endowment † *ex aſſenſu matris* is good, but ‡ *ex aſſenſu fratris* 'tis holden is not good. And Dowment ‖ *ex aſſenſu patris* after the Marriage, is good. Dowment † *ex aſſenſu matris* is good, becauſe the Son is Heir apparent of her Lands; but ‡ *ex aſſenſu fratris* is not ſo, becauſe one Brother cannot be ſaid to be Heir apparent to another, ſeeing the Brother may marry, and have Children, and the Dow-

* *And it is his Right to diſpoſe, whoſe Right it is to give.*
† *By the Mother's Aſſent.* ‡ *By the Brother's Aſſent.*
‖ *By the Father's Aſſent.*

ment * *ex aſſenſu*, is good at any Time during the Marriage, becauſe it is only aſcertaining the Quantity of Infeudation, nor is there any Objection that this ſhould over-reach a Purchaſer; becauſe, when an Heir apparent is married, it is a ſufficient Notice to enquire into the Settlement of the Land of the Father. If a Man marry a Woman in a Chamber, Dowment † *ad Oſtium Cameræ* is not good. Dowment *ad Oſtium Eccleſiæ* of the Moiety of the Land is good; and a Woman married in a Chamber, ſhall not have Dower by the Common Law. *Quere* of Marriage made in Chapels not conſecrated, *&c.* for many are by Licence from the Biſhop married in Chapels, *&c.* and it ſeemeth reaſonable, that in ſuch Caſes, ſhe ſhall have Dower.

FORMERLY they held, if they were not married at the conſecrated Church, that the Wife ſhould not be endowed, becauſe the Contract not being ſolemnly made, was not ſufficient for an Infeudation; but afterwards, when the Solemnization of Marriages in conſecrated Chapels was allowed by Licence from the Biſhop; and when it came to be held that Marriages were good, tho' done in private,

* *By Aſſent.* † *At the Chamber Door.*

vate, * and in unconſecrated Places, ſince they held that the Sacrament depended on the Prieſt, and not on the Place, they then determined (ſince the Heir's Title to the Demeſne depended on the ſame Title as the Wife's Claim to Dower) that Dower was demandable upon ſuch private Marriages. And in ſome Places, the Wife ſhall have the Moiety in Dower, as in Gavel-kind.

AND in ſome Cities ſhe ſhall have all by the Cuſtom, which is called *Free-Bench.*

THE *Free-Bench* ſeems to have its Riſe from the ſame Cuſtom as the *Borough Engliſh* in *villain Tenure*, the Lords having the Cuſtom to poſſeſs their Tenants Wives, they contracted that the younger Son ſhould inherit; but the Wife obtained the Privilege over the whole Eſtate, and eaſily compounded for Crimes of that kind.

AND *Glanvil* ſaith, that * *ad Oſtium Eccleſiæ*, a Man cannot aſſign more than the 3d Part in Dower; and if he do, the Wife ſhall be admeaſured, *&c.* but leſs may be aſſigned by Law.

YET at this Day, it ſeemeth that the Aſſignment † *ad Oſtium Eccleſiæ*, of more than

* *See now* 26 *Geo.* 2. *c.* 33. *intitled, An Act to prevent clandeſtine Marriages.* † *At the Church Door.*

than the third Part is good, and ſhe ſhall not be admeaſured for it.

THE Reaſon why in *Glanvill's* Time Endowment * *ad Oſtium Eccleſiæ* of more than a third Part was not good, ſeems to be, becauſe it hurted the Fruit of the Lords feudal Service during Minority; but ſince it ſubſiſts on a Contract made on a Conſideration of Marriage, it ought to prevail though it exceeds a Third; and this is the Reaſon of the latter Reſolutions.

AND the Wife ſhall not be diſtrained in the Lands, which ſhe holdeth in Dower, for the Debts of the Huſband in his Life due to the King, nor in the Lands of Inheritance of the Wife, nor in the Lands which ſhe hath by Purchaſe, made by the Huſband to him and his Wife, and unto their Heirs, and if ſhe be diſtrained by the Sheriff, ſhe may ſue forth ſuch Writ.

Quod Mulieres non diſtringantur pro Debito virorum ſuorum in Terris & Tenementis quæ tenent in Dotem de Dono Virorum ſuorum vel de Hæreditate ſuâ, vel de Perquiſito ſuo, &c. Reg. 142. b.

Rex, Vice-comit. Salutem cum ſecundum legem & conſuetudinem regni noſtri Angliæ, *mulieres in terris & tenementis, quæ tenent in dote de dono virorum ſuorum, vel quæ ſunt de hæreditate ſuâ, vel quæ ſibi acquiſiverunt, pro debitis virorum ſuorum reddendis diſtringi non debeant; ac tu* B. *quæ fuit uxor* A.

* *At the Church Door.*

A. *distringis in terris & tenementis suis quæ tenet in dotem de dono prædicti* A. *& etiam quæ fuerunt de hæreditate ipsius* B. *sicut ex querelâ suâ accepimus, tibi præcipimus quod ipsam* B. *in terris ac tenementis suis quæ tenentur in dotem vel sunt de hæreditate suâ propriâ vel ex quæsito ipsius* B. *pro debito ipsius* A. *quondam viri sui reddendo, non distringas vel distringi facias contra legem & consuetudinem prædictas, & districtionem, &c.*

That Women are not to be distrained for the Debt of their Husbands in the Lands and Tenements which they hold in Dower of the Gift of their Husbands, or of their own Inheritance, or of their own Earning, &c.

'THE King, to the Sheriff, Greeting. 'Whereas according to the Law and 'Custom of our Kingdom of *England*, 'Women ought not to be distrained for 'the Debts of their Husbands, which 'are to be accounted for, in the Lands 'and Tenements, which they hold in 'Dower, of the Gift of their Husbands, 'or which are their own Inheritance, or 'which they have acquired themselves; 'and you distrain *B.* who was Wife of *A.* 'in her Lands and Tenements, which 'she holds in Dower of the Gift of the 'aforesaid *A.* and also which were the 'Inheritance of *B.* as we have been in'formed by her Plaint: We command 'you, that you do not distrain, or cause 'to be distrained *B.* in her Lands and 'Tenements, which are held in Dower,

'or

'or are of her own proper Inheritance,
'or of the Earning of the ſame *B.* for
'the Debt of *A.* which is to be account-
'ed for, formerly her Huſband, againſt
'the Law and Cuſtom aforeſaid, and the
'Diſtreſs, *&c.*

Reg. 142. b. 143. THERE is another Form of the Writ in the Regiſter for Tenants in Dower, which is directed unto the Sheriff, commanding him that he do not diſtrain the Wife in thoſe Lands which ſhe holdeth in Dower, or of her own Inheritance for her Huſband's Debt; but that Writ hath theſe Words in the End of it, * *dum tamen hæred. & executorum teſtamenti ipſius* E. *ad debita illa nobis ſolvenda ſufficiat non diſtringas, &c.* and by theſe Words in the Writ, it ſeems, that if the Heir or the Executor, have not ſufficient of Lands or Goods to pay the Debt, that the Wife ſhall be charged, and diſtrained for the Debt of the Huſband in thoſe Lands; but it ſeemeth reaſonable that the Wife ſhall not be charged or diſtrained in thoſe Lands which were the joint Purchaſe made to the Huſband and her; but if the Huſband be indebted to the King before ſhe hath Title to Dower, it ſeemeth to be other-

* *Provided the Heirs and Executors of the Teſtament of the ſame E. are able to pay us the Debts, do not diſtrain, &c.*

otherwiſe; *ſee* 4 *Aſſize* 36. 53. *Dy.* 224. *Sir Wm. St. Lewis's Caſe.*

AND there is another Writ in the Regiſter for the Wife, directed to the Sheriff, that he did not diſtrain her in Lands or Tenements, which her Huſband and ſhe purchaſed jointly, before the Huſband was indebted to the King; if they purchaſe the Lands jointly to them in Fee, the Lands after the Death of the Huſband, in the Hands of the Wife, and her Heirs, ſhall be diſcharged of the Debt; and if ſhe be diſtrained, that he deliver them again to the Wife.

AND by the ſame Reaſon, though the Huſband be before indebted to the King, that if he and ſhe purchaſe the Lands jointly in Fee to them, after the Death of the Huſband, the Wife, and her Heirs, be diſcharged of the Debt. And there is another Writ in the Regiſter for the Tenant in Dower, directed to the Sheriff, that he do not diſtrain the Wife for the Huſband's Debts, becauſe that the Heir who ought to pay the ſame out of the Lands, is within Age, and in Ward to the King; or becauſe that other Tenants who ſhould be charged with the Payment thereof are omitted.

AND ſo it ſeemeth, the Lands of the Tenant in Dower ſhall be diſcharged, if there

there were other Lands of the Huſband to pay the Debts; and thoſe Writs appear in the *Regiſter*, *fo.* 142, 143.

AND another Writ directed to the Sheriff, that he do not diſtrain the Wife who holdeth Lands in Dower, for the Debts of the Huſband, which he owed to the King, before the Contract of Marriage between him and the Wife purchaſed jointly in Fee, for the Huſband's Debts, which he became Debtor for before the Purchaſe; and ſhe may have ſuch Writ out of *Chancery*, directed to the Treaſurer and Barons of the *Exchequer*, commanding them that they enquire thereof; and if they find the ſame, that they ſurceaſe and diſcharge the Wife, with this Proviſo in the Writ. * *Proviſo quod debita illa de executoribus & hæredibus predicti Rac tenentibus terrarum ac tenementorum quæ ſua fuerunt & quæ inde de jure debent onerari ad opus noſtrum leventur ut juſtum eſt*, T. *&c.*

Reg. 143. b.

THE true Diſtinction of theſe Caſes is, that if the Debt to the King be ſubſequent to the Marriage, then the Wife's Dower, being a Contract for Infeudation, at the very Time of the Marriage, and which

* *Provided that thoſe Debts be levied, as is juſt to our uſe of the Executors and Heirs of the aforeſaid* R. *and the Tenants of the Lands and Tenements which were her own, and which ought by Law to be charged with them.*

which binds the Lands, the Aſſignment of Dower over-reaches the Charges by the Debt of the King; for if the Huſband could not alien, during the Coverture, ſo as to defeat the Wife's Infeudation, he could not make any other Charges that would impeach it; and therefore the Wife may have a general Prohibition, ſince the King's Debt does not affect the Lands; but if the King's Debt was before the Marriage, then her Contract for Infeudation was ſubject to the Burthen of the King's Debt; and therefore, there ſhe can only have a ſpecial Prohibition, with an *ita quod*, that there are Lands in the Hands of the Heir, or Chattles in the Hands of the Executor, to anſwer the King's Debt; for if there be not, then the King may levy the whole Debt upon the Dowreſs, and ſhe muſt come on the other Feoffers of the Huſband, who are equally liable to Contribution; for the Huſband by ſubſequent Alienations cannot put ſuch a Diſadvantage upon the Crown, that has given him Credit, as to force the Crown to bring in every Alienee in order to be paid by them, but the King has a Right to ſeize the Lands in whoſeſoever Hands he finds them, if ſuch Perſon comes in ſubſequent to ſuch Charges.

Or

Of the Writ de Dote Assignanda.

The Writ *de Dote Assignanda* lieth, where it is found by Office that the King's Tenant was seised of Tenements in Fee, or in Fee-tail, the Day he died, *&c.* and held of the King in *Capite*, then the Wife may, and ought to come into the *Chancery*, and there make Oath, that she will not marry without the King's Licence; and thereupon the King may assign her Dower in the *Chancery* of those Manors and Lands. There was to be no Marriage of the Dowress, during the Nonage of the Heir, that was in Ward of the King; without the King's Licence, because by the general Constitution of the Feudal Law, every Feudatory of the Crown was to marry with Licence, that there might be no Disparagement to the Family, whilst they were under the Care of the Crown, and the Dower being assigned by the Crown, was in Nature of a Royal Infeudation, therefore under the same Necessity to take out a Licence, and thereupon she shall have a Writ unto the Escheator, where the Lands are, which shall be thus.

Rex

Rex Eſcaetori ſuo in comitatu Bed. & Buk. *ſalutem. Sciatis quod de terris et tenementis quæ fuerunt* H. *defuncti, qui de nobis tenuit in capite, et quæ occaſione mortis ejuſdem* H. *capta ſunt in manum noſtram: aſſignavimus* I. *quæ fuit uxor prædicti* H. *tertiam partem maneriorum de* T. & C. *in comitatu* S. *de* C. *in comitatu* T. *cum pertinentiis, nec non tertiam partem propartis quæ fuit ipſius* H. *curiæ libertatis honoris* Wynton, *et viſus francipleg. in dicto comitatu* Leyc' *habendam in dotem ipſam de maneriis & proparte prædictis, ſecundum legem et conſuetudinem regni noſtri* Angliæ *contingentem, nec non de aſſenſu* E. *principis* Wall. *filii noſtri chariſſimi, cui cuſtodiam manerii de* R. *in comitatu* Buk. *quæ ad* I. *li. et manerii de* N. *cum pertinentiis in dicto comitatu* Bed. *quæ ad* X. *li. extenduntur per annum, ſicut per extentas inde de mandato noſtro factas, et in* cancellariâ *noſtrâ retornatas, eſt compertum. Aſſignavimus præfatæ* Johannæ *dictum manerium de* N. *cum pertinentiis, pro dote ſuâ dictorum maneriorum de* R. *et* N. *habendum in formâ præd. Et ideo tibi præcipimus quod eidem* I. *dictum manerium de* N. *cum pertinentiis liberes: habend. in dotem ſuam ſicut præd. eſt* T. *&c.*

De Dote aſſignanda. Reg. 297. b.

Of aſſigning Dower.

'THE King, to his Eſcheator, in the 'Counties of *Bedford* and *Buckingham*, 'Greeting. Know ye that of the Lands 'and Tenements which belonged to *H.* 'deceaſed, who held of us in Chief, 'and which by Reaſon of the Death of '*H.* are taken into our Hands; we have 'aſſigned to *J.* who was the Wife of the 'aforeſaid *H.* a third Part of the Manors 'of *T.* & *C.* in the County of *S.* of *C.* 'in the County of *T.* with the Appur-'tenances, and alſo a third Part of the '* Purparty which belonged to the ſame '*H.* of the Court of Liberty and Honour 'at *Winchester*, and View of Frankpledge, 'in the ſaid County of *Leiceſter*, to hold 'in Dower, belonging to her of the 'Manors and Purparty aforeſaid, accord-'ing to the Law and Cuſtom of our 'Kingdom of *England*, and alſo with 'the Aſſent of *E.* Prince of *Wales*, our 'deareſt Son, who has the Guardian-'ſhip of the Manor of *R.* in the County 'of *Buckingham*, which are extended 'Yearly to 50 *l.* and of the Manor of *N.* 'with the Appurtenances in the ſaid 'County of *Bedford*, which are extend-'ed Yearly to 10 *l.* as appears by the Ex-'tents thereof, by our Command made, 'and

* *Purparty is that Part or Share of an Eſtate, firſt held in Common by Parceners, which is by Partition allotted to any of them.* Jac. Law Dict. See *Old Nat. Brev.* 11.

'and returned into our *Chancery*. We 'have aſſigned to the aforeſaid *Joan* the 'aforeſaid Manor of *N.* with the Appur-'tenances, for her Dower of the afore-'ſaid Manors of *R.* and *N.* to hold in 'Form aforeſaid. And therefore we com-'mand you to deliver to the ſame *J.* the 'aforeſaid Manor of *N.* with the Appur-'tenances, to hold for her Dower as is 'aforeſaid. Witneſs, *&c.*

SEE *Rot. finium* 1 *E.* 1. *Mem.* 21. A command to the Eſcheator, to ſeize all the Lands, * *de quibus* A. *ſi, &c. & etiam quod Margeriæ quæ fuit uxor præd.* A. 20. *Libras de terris & tenementis præd. aſſignari faciat donec rationabilem dotem ipſam contingent. ſecundum legem & conſuetudinem ſibi fecerit aſſignari; vide accord. Cloſe Roll,* 2 *E.* 1. *M.* 15.

AND when the Wife hath made her Oath in the *Chancery*, ſhe may have a Writ *de Dote aſſignanda*, directed to the Eſcheator, to aſſign her Dower; and the Writ ſhall recite, that ſhe hath made her Oath in the *Chancery*, *&c.* But the Uſe is to make the Aſſignment of the Dower in *Chancery*, and to award a Writ unto the

 Eſcheator,

* *Of which* A. *if,* &c. *and alſo that he cauſe to be aſſigned to* Margery, *who was the Wife of* A. 20 *l. out of the Lands and Tenements aforeſaid, until he ſhall have aſſigned the reaſonable Dower belonging to her, according to Law and Cuſtom; ſee a cloſe Roll accordingly.*

Eſcheator, to deliver the Lands aſſigned unto her; and although the King doth commit the Cuſtody of the Land unto another, yet the King may aſſign Dower unto the Wife in *Chancery*; and ſhe ſhall have a Writ unto the Eſcheator, to deliver unto her that Dower as appeareth by the *Reg.* 298. *Kelw.* 132. It ſeems that the Committee cannot aſſign Dower; but *quere*, if it ſhall not be good till the Heir ſues Livery? and the Writ is ſuch.

Reg. 298.

Rex Eſcaetori in comitatu Warr. & Leyc. *ſalutem. Cum inter cætera terras et tenta.* I. *quæ fuit uxor* H. *defuncti, qui de nobis tenuit in capite, per nos de terris et tenementis, quæ fuerunt præd.* H. *in dotem aſſignatis, aſſignaverimus eidem* I. *partem manerii de* Gronby *cum pertinentiis in comitatu præd. nec non tertiam partem propartis quæ fuit ipſius* H. *Curiæ libertatis honoris* W. *et viſus francipleg. in eodem comitatu, habend. in dotem in formâ præd. tibi præcipimus quod eidem* I. *cujus ſacramentum quod ſe non maritabit ſine licentiâ noſtrâ recepimus, dictas tertias partes in ballivâ tuâ in præſentiâ cuſtodis eorum manerii et tertiæ partis per vos inde præmonend. ſi intereſſe voluerit, vel attornati ſui in hâc parte, aſſignari et liberari facias. Habend. in dote ſicut præd. eſt, et cum aſſignationem illam, &c.* T. *&c.*

‘ The

Of aſſigning Dower.

'THE King, to the Eſcheator in the 'Counties of *Warwick* and *Leiceſter*, 'Greeting. Whereas among other the 'Lands and Tenements of *J.* who was 'the Wife of *H.* deceaſed, who held of 'us in Chief, by us of the Lands and 'Tenements, which belonged to the 'aforeſaid *H.* in Dower; we are willing 'to aſſign to the ſame *J.* Part of the 'Manor of *Gronby* with the Appurte-'nances in the County aforeſaid, and 'alſo a third Part of the Purparty which 'belonged to the ſame *H.* of the Court 'of Liberty and Honour of *W.* and the 'View of Frankpledge, in the ſame 'County, to hold in Dower, in Form 'aforeſaid; we command you to cauſe to 'be aſſigned, and delivered to the ſame '*J.* whoſe Oath that ſhe will not marry 'without our Licence, we have taken, 'the aforeſaid three Parts in your Baili-'wick, in the Preſence of the Warden 'of the Manor and third Part, to be by 'you thereof forewarned, if he ſhall be 'deſirous of attending, or his Attornies 'on his Behalf: to hold in Dower as 'aforeſaid, and when that Aſſignment, '*&c.* Witneſs, *&c.*

AND if the Wife after the Death of the Huſband, doth come into the *Chan-*

cery, and prayeth her Dower, there the King may grant a Writ unto the Eſcheator, commanding him to take Security of the Wife, that ſhe does not marry herſelf without Licence, and that the Eſcheator do aſſign Dower unto her; and the Writ ſhall be ſuch.

De Dote aſſignandâ. Reg. 297.

Rex Eſcaetori ſuo in comitatu Eborum *ſalutem. Præcipimus tibi quod capto ſacramento* M. *quæ fuit uxor* W. *defuncti, qui de nobis tenuit in capite, quod ſe non maritabit ſine licentiâ noſtrâ, eidem* M. *rationabilem dotem ſuam ipſam de omnibus terris & tenementis, quæ præd* W. *quondam vir ſuus tenuit in dominico ſuo ut de feodo, in ballivâ tuâ die quo obiit, & quæ per mortem præd.* W. *capta fuerunt in manum noſtram, et in manu noſtrâ ſic exiſtunt, ſecundum legem et conſuetudinem regni noſtri* Angliæ *contingentem, per extentam inde factam, vel aliam ſi neceſſe fuerit iterato faciendam, in præſentia* B. *per te inde præmonend. ſi intereſſe voluerit, aſſignari fac. et cum aſſignationem illam ſic feceris, eam ſub ſigillo tuo diſtincte et aperte mittatis, ut eam in rotulis* cancellariæ *noſtræ prout moris eſt irrotulari faciamus*, T. *&c.*

‘ The

'THE King to his Eſcheator of the County of *York*, Greeting. We command you that having taken the Oath of *M.* who was the Wife of *W.* deceaſed, who held of us in chief, that ſhe will not marry without our Licence, you cauſe to be aſſigned to the ſame *M.* her reaſonable Dower, belonging to her of all the Lands and Tenements, which the aforeſaid *W.* formerly her Huſband, held in his Demeſne as of Fee, in your Bailiwick, the Day on which he died, and which by the Death of the aforeſaid *W.* were taken into our Hands, and in our Hands ſo remain, according to the Law and Cuſtom of our Kingdom of *England*, by Extent thereof made, or another to be again made, if neceſſary, in the Preſence of *B.* to be by you thereof forewarned, if he ſhould be willing to attend; and when you ſhall have ſo made that Aſſignment, that you ſend it under your Seal diſtinctly and openly, that we may cauſe it to be inrolled among the Rolls of our Chancery, as is uſual. Witneſs, *&c.* Of aſſigning Dower.

AND if a Man dieth ſeized of Lands which are holden by Knight's Service, of any Manor, or otherwiſe, as of an Abbey, Biſhoprick, or Priory, or ſuch as

are in the King's Hands, by Reaſon of a Vacancy of the Abbot or Biſhoprick, &c. then, if the Wife will have Dower, ſhe ought to ſue in the *Chancery*, to have ſuch Writ directed to the Eſcheator, to aſſign her Dower; but there the Wife ſhall not take Oath that ſhe will not marry without the King's Licence, as appeareth by the Writ; for the Prerogative does not obtain in this Caſe, for the King aſſigns Dower as Guardian of the Temporalities, and not as the ſuperior Lord; and the Writ is;

De dote aſſignandâ, Reg. 297.

Rex, Eſcaetori ſuo in comitatu Eborum *ſalutem. Præcipimus tibi quod* A. *quæ fuit uxor* B. *defuncti, qui de abbatiâ de burgo ſancti* Petri *nuper vacante, & in manu noſtrâ exiſtente, tenuit per ſervitium militare: rationabilem dotem ſuam ipſam, de omribus terris & tenementis, &c. quæ præd.* B. *vir ſuus tenuit in abbatiâ præd. in balivâ tuâ die que obiit, & quæ per mortem ipſius* B. *in manu noſtrâ exiſtunt, &c.* (ut ſupra.)

Of aſſigning Dower.

'The King, to his Eſcheator of the 'County of *York*, Greeting. We com- 'mand you, that A. who was the Wife 'of *B.* deceaſed, who held by Knight's 'Service, of the Abbey of the Borough

4. 'of

'of St. *Peter* lately vacant, and remaining in our Hands, her reaſonable Dower of all the Lands and Tenements, *&c.* which the aforeſaid *B.* her Huſband, held in the aforeſaid Abbey, in your Bailiwick the Day on which he died, and which by the Death of *B.* remain in our Hands, *&c. (as before.)*'

AND the like Writ may be ſued by the Wife for Lands which her Huſband held by Knight's Service, of the Manor of him who is in Ward to the King, by Reaſon of his Nonage; but there ſhe ſhall not make Oath, that ſhe will not marry herſelf, no more than in the Caſe before; for the above Reaſon.

AND the King may aſſign Lands in Dower in the *Chancery*, rendering Rent yearly to the King, and becauſe the Lands do exceed the Value of the 3d Part of all the Tenements whereof ſhe ought to have Dower; and then, upon that Aſſignment made in *Chancery*, ſhe ſhall have ſuch Writ to the Eſcheator:

De dote aſſignandâ cum clauſulâ reddendi quod excedit. Reg. 297. b.

Rex Eſcaetori ſuo ſalutem. Scias quod de terris & tenementis quæ fuerunt E. *de* B. *defuncti, qui de nobis tenuit in capite, & quæ occaſione mortis ejusdem* E. *capta ſunt in manum noſtram aſſignavimus* M. *quæ*

quæ fuit uxor præd. E. *maneria ſubſcripta, videlicet maneria de* B. *et de* C. *cum pertinentiis in comitatu* L. *quæ ad centum Li. extenduntur per annum, habenda in dotem ipſam de terris & tenementis præd. ſecundum legem et conſuetudinem regni noſtri* Angliæ *contingentem, reddendo inde nobis per annum ad* ſcaccarium *noſtrum tantum quod excedit dotem ſupradictam. Et ideo tibi præcipimus quod eidem* M. *dicta maneria cum pertinentiis liberes: habenda in dotem ſuam in formâ prædictâ,* F. *&c.*

Of aſſigning Dower with a Clauſe to return the Overplus.

'THE King, to his Eſcheator, Greeting. Know that we have aſſigned, out 'of the Lands and Tenements which be-'longed to *E.* of *B.* deceaſed, who held 'of us in chief, and which, by Occaſion 'of the Death of *E.* are taken into our 'Hands, to *M.* who was Wife of the 'aforeſaid *E.* the following Manors, *viz.* 'the Manors of *B.* and of *C.* with the 'Appurtenances in the County of *L.* 'which are extended at 100 *l.* a Year, 'to have in Dower belonging to her of 'the Lands and Tenements aforeſaid, ac-'cording to the Law and Cuſtom of our 'Kingdom of *England*, returning to us 'ſo much thereof, as exceeds the afore-'ſaid Dower, yearly at our Exchequer.

'And therefore we command you to de-
'liver to the ſame *M.* the ſaid Manors
'with the Appurtenances: To be holden
'for her Dower in Form aforeſaid, Wit-
'neſs, *&c.*'

And if the Wife be impotent, ſo as ſhe cannot come into *Chancery* to make Oath, and to demand her Dower to be aſſigned by the King, then ſhe may have a ſpecial Writ, directed to certain Perſons to take her Oath, and to receive Attorney for her to ſue for her Dower in the *Chancery*, *&c.* and the Writ appeareth in the *Reg. fo.* 298—And if the King makes Livery unto the Heir at full Age, ſaving unto the Wife her Dower, to be aſſigned by the King; then, if the Wife will demand Dower, ſhe ought to ſue for the ſame in *Chancery*; and if ſhe do demand her Dower there, then ſhall iſſue a ſpecial Writ unto the Eſcheator, that he warn the Heir for to be in *Chancery* at a certain Day, *&c.* And there the Wife ſhall have the ſame Day to receive her Dower, *&c.* And the Writ which ſhall iſſue againſt the Heir ſhall be:

Scire facias hæredi ad intereſſendum aſſign. dotis. Reg. 298.

Rex Eſcaetori, &c. ſalutem. Cum dominus in E. *nuper rex* Angliæ *pater noſter, 20 die Januarii proximæ præterito, ceperit ho-*

homagium T. *de* B. *fil. & hæredis* T. *de* B. *defuncti de omnibus terris & tenementis quæ idem* T. *pater ſuis tenuit de dicto patre noſtro die quo obiit, & ei terras & tenta illa reddiderit, eaq; ſibi mandaverit liberari, ſalvo jure cujuſlibet & ſalva* M. *quæ fuit uxor prædicti* T. *rationabili dote ſuâ, ipſam de terris & tenementis præd. ſecundum legem & conſuetudinem regni noſtri* Angliæ *contingente, ei prout moris aſſignand. ſicut per inſpectionem rotulorum cancellariæ dicti patris noſtri nobis conſtat, ac præfata* M. *nobis ſupplicaverit ut ei dotem ſuam, ipſam de terris & tenentis præd. contingentem ſecundum legem & conſuetudinem regni noſtri* Angliæ *aſſignari faciamus, per quod diem dedimus præfatæ* M. *quod ſit in cancellariâ noſtrâ in craſtino animarum, &c. ubicunq; &c. ad recipiendam dotem ſuam præd. tibi præcipimus quod ſcire facias præfato* T. *quod ad diem præd. interſit aſſignationi dotis præd. ſi ſibi viderit expedire. Et habeas ibi nomina, &c. et hoc breve* T. *&c.*

Scire facias to the Heir to be preſent on aſſigning Dower.

'THE King to his Eſcheator, *&c.* 'Greeting. Whereas Lord *E.* late King 'of England, our Father, on the twen-'tieth Day of *January* laſt paſt, ac-'cepted the Homage of *T.* of *B.* Son and 'Heir of *T.* of *B.* deceaſed, of all the 'Lands

'Lands and Tenements which the ſame
'*T.* his Father, held of our ſaid Father
'on the Day of his Death, and had
'granted him thoſe Lands and Tene-
'ments, and had commanded them to
'be delivered to him, ſaving the Right
'of every one, and ſaving to *M.* who
'was the Wife of the aforeſaid *T.* her
'reaſonable Dower belonging to her, of
'the Lands and Tenements aforeſaid, ac-
'cording to the Law and Uſage of our
'Kingdom of *England*, to be aſſigned as
'is cuſtomary, as by Inſpection of the
'Rolls of the *Chancery* of our ſaid Father
'appears to us, and the aforeſaid *M.* hath
'beſought us, to cauſe her Dower be-
'longing to her to be aſſigned her out
'of the Lands and Tenements afore-
'ſaid, according to the Law and Cuſtom
'of our Kingdom of *England:* Where-
'fore we gave a Day to the aforeſaid *M.*
'to be in our *Chancery* on the Morrow
'of *All Souls, &c.* whereſoever, *&c.* to
'receive her Dower aforeſaid. We com-
'mand you, that you cauſe it to be
'known to the aforeſaid *T.* that he may
'be preſent on the Day aforeſaid, on the
'Aſſignment of the Dower aforeſaid, if
'he ſhall find it expedient, and have
'there the Names, *&c.* and this Writ.
'Witneſs, *&c.*'

But

But if the King maketh Livery unto the Heir by his Writ, directed to the Escheator, by which Writ he commandeth his Escheator to deliver unto him Seisin of all his Lands, &c. * *salvo jure cujuslibet*, and he putteth not in the Writ these Words, † *Salvâ* M. *quæ fuit uxor, &c. rationabile dote suâ ipsius de terr. & tenementis, &c. contingent. et per nos assignat.* Then in that Case, the Wife ought to sue her Writ of Dower against the Heir, if she will demand Dower of those Lands, because the King made Livery generally of those Lands by his Writ, without any Reservation of Dower to be assigned by him, &c.—And if the King make a Reservation of Dower, to be assigned by him, by his Writ of Livery, which is directed to the Escheator; if the Wife never demand Dower, or if she hath Dower assigned unto her by the King in *Chancery*; yet, after the Assignment made by the King, the Reversion thereof is in the Heir, and he shall not sue Livery of that Reversion, after the Death of the Tenant in Dower, because the Writ of Livery doth not reserve any thing to the King, but Assignment of Dower to the Wife; but the Writ doth command the Escheator

* *Saving every Body's Right.*

† *Saving* M. *who was the Wife of*, &c. *her reasonable Dower out of the Lands and Tenements*, &c. *belonging, and by us assigned to her.*

Eſcheator to deliver Seiſin of all the Lands, and that the Eſcheator doth, and by that the Livery of all the Lands paſſeth from the King; and therefore it followeth, that when the Wife is aſſign'd her Dower by the King in *Chancery*, that yet the Reverſion doth remain in the Heir, *&c.* for which he ſhall not ſue a new Livery of that Reverſion, after the Death of the Tenant in Dower, *&c. yet quere* of that Caſe.

When the King's Feudatory dies, during the Minority of the Heir, the King is to perfect the Infeudation of Dower, and therefore to make the Aſſignment; and tho' the King does not make the Aſſignment during the Minority, yet he may reſerve to himſelf the Power of Aſſignment after the Heir's full Age, and that is a Prerogative for the Benefit of the Dowreſs, ſince it may be better, and more compendiouſly done by Petition in *Chancery*, and thereby ſetting it out by the Eſcheator, rather than by Suit at Law, which is ſubject to great Delay; the King may, if he pleaſe, on the Livery to the Heir, make an Exception of his Prerogative, touching the Aſſignment of Dower, and then the King ſhall aſſign Dower at the full Age of the Heir; but then ſuch an Aſſignment being an Infeudation of the Dowreſs, is a Delivery of it out of the

the King's Hands, and by conſequence the Heir need not ſue a Livery of the Reverſion; but if the Dowreſs does not then petition, then the King often granted the Livery to the Heir, without any Exception, touching his Prerogative of aſſigning Dower; and then the Dowreſs was driven to her Suit at Common Law againſt the Heir if he will not aſſign, becauſe the Livery giving the whole Demeſne out of the King's Hands, into that of his Tenant without any Reſerve, the King parts with his Power of making any Infeudations of that Eſtate; and that muſt be conſtrued to be the Intent of that Livery, where it is without any Reverſion; but the Right of the Dowreſs follows it into the Hands of the Heir, where ſhe muſt obtain it, as by Law ſhe may; and if the Wife be aſſign'd Dower in the *Chancery*, and afterwards it is ſurmiſed by the Heir, or by any other for the King, that the Land aſſigned to the Wife is not extended to the very Value; but that the Land aſſigned to her is much more in Value than it is extended at, and that the Lands which remain in the King's Hands are extended to the full Value, *&c.* then the King ſhall ſend a Writ to the Eſcheator, to make a new Extent; and upon that Writ returned, if it be found that the Land aſſigned to the

the Wife is of greater Value, *&c.* then upon return thereof, a *Scire facias* ſhall be awarded againſt the Wife, to ſhew Cauſe wherefore ſhe ſhall not be endowed a-new, *&c.* and if ſhe be warned, and maketh Default, it ſeemeth ſhe ſhall be a-new endowed for her Default; and if ſhe appear, and cannot ſay any thing contrary to the new Extent, ſhe ſhall be endowed a-new; ſo as Part of the Land aſſigned to her, ſhall be taken from her at the King's Pleaſure; or the King may make a new Aſſignment of all that ſhe had in Dower, if he pleaſeth; and a new Writ ſhall go to the Sheriff to deliver her Seiſin thereof ſo newly aſſigned to her—— *Quere the Caſe as to this Point.*—If the Dower of the Feme be evicted by elder Title, upon the Record brought into *Chancery*, by which ſhe was evicted, ſhe ſhall have a *Scire facias* to re-ſeiſe the Lands, and to be endowed a-new of the Reſidue, tho' after Livery made to the Heir, 43 *Aſſ.* 32. It ſeems alſo, that if Dower be aſſigned to the Wife within Age in *Chancery*, and after Livery is made to the Heir, ſhe may have a Writ of Dower of the Reſidue, 18 *Ed.* 3. 29. If the Wife maketh Oath that ſhe will not marry herſelf without the King's Licence, and is endowed upon the ſame,

&c. and afterwards ſhe marrieth without Licence, *&c.* then the King ſhall ſend a Writ to the Eſcheator, that he re-ſeiſe all the Lands ſhe holdeth in Dower, as appears by the Reſignation, and not all the other Lands which ſhe or her Huſband had in their own Right: and the Writ is ſuch:

Mandamus quæ plura de ten. viduæ maritatæ ſine licentiâ regis in manum, regis capiendis. Reg. 295 b.

Rex, eſcaetori in comitatu L. *ſalutem. Cum* A. *quæ fuit uxor* J. *de* C. *defuncti, qui de nobis tenuit in capite, quæ nuper ſacramentum præſtitit corporale quod ſe non maritaret ſine licentiâ noſtrâ, jam ſe* W. *de* P. *maretaverit, licentiâ noſtrâ ſuper hoc non obtentâ ut accepimus: nos contemptum hujuſmodi nolentes tranſire impunitum, nec non indemnitati noſtræ volentes proſpicere in hâc parte, tibi præcipimus quod ſi ita eſt tunc omnia, terras et tenementa quæ præd.* W. *&* A. *tenent in dotem ipſius* A. *de hæreditate præd.* Johannis *in ballivâ tuâ ſine dilatione capias in manum noſtram, ita quod de exitibus inde provenientibus nobis reſpondeas ad ſcaccarium noſtrum, quouſq; nobis de forisfactura ad nos inde pertinente ſatisfactum fuerit, vel aliud inde duxerimus demandand.* T. *&c.*

Mandamus to ſeize into the King's Hands, a Widow's Tenements, who married without the King's Licence.

'THE King, to the Eſcheator in the 'County of *L.* Greeting. Whereas A. 'who was the Wife of *J.* of *C.* deceaſed, 'who held of us in chief, who lately took 'her corporal Oath, that ſhe would not 'marry without our Licence, has now 'married *W.* of *P.* as we are informed, 'our Licence thereon not having been 'obtained: We, unwilling that ſuch a 'Contempt ſhould paſs unpuniſhed, and 'alſo deſirous to take care of our In-'demnity in this Behalf, command you, 'that, if it be ſo, then, without Delay, 'you ſeize into our Hands all the Lands 'and Tenements, which the aforeſaid *W.* 'and *A.* hold in Dower of the ſame *A.* 'of the Inheritance of the aforeſaid *John*, 'in your Bailiwick, ſo that you anſwer us 'at our *Exchequer* the Rents ariſing 'therefrom, until the Forfeiture to us 'thereof belonging is ſatisfied to us, and 'that we ſhall think proper to give you 'other command in charge touching the 'ſame. Witneſs, *&c.*'

Of the WRIT QUOD EI DEFORCEAT.

THE Writ of *Quod ei deforceat* lieth where the Tenant in Tail or Tenant in Dower, or by the Curteſy, or for Term of Life, loſe their Lands by Default, in

Præcipe quod reddat brought againſt them; they have no other Remedy if they were ſummoned according to the Law, *&c.* but this Writ of *quod ei deforceat*, which is given by the Statute of *Weſtminſter*, 2 c. 4. and the Writ is mentioned in that Statute.

13 *Ed.* 2 Inſt. 347.

THE Writ of *Quod ei deforceat* ſeems to have ariſen from the Inconveniency which Wives ſuffered by a Trick to diſappoint them of Dower; for the Huſband was wont to be impleaded by his Alienees, and loſe by Default, and the Judgment being given for the Alienee to recover on ſuch Default of the Huſband his Seiſin, he came in by Title Paramount, and therefore defeated the Seiſin of the Huſband, and conſequently the Title of the Wife to Dower; and it was generally held, that no Judgment by Default, could be defeated but by the very Tenant; therefore the Recovery by Default was miſchievous, not only to the Tenant in Dower, but to the Tenant in Tail and Tenant for Life, that happened to loſe by Default; for they could not have a Writ of Right, becauſe they were not the very Tenant holding of the Feudal Lord; therefore this Statute gave a *Quod ei deforceat*, by which the Recovery could not bar the Demandant's Right, but the Defendant was obliged to ſhew an elder Title;

Title; but the Iſſue in Tail could not have a *Quod ei deforceat*, becauſe he had his *Formedon in Deſcender* by the Statute *De Donis*; yet the Writ or Count doth not ſuppoſe any Recovery, 18 *H.* 6. 25. Upon loſing by Default in a *Ceſſavit*, 8 *R.* 2. *bre.* 171. and the ſame is ſuch:

Breve de Dote amiſsâ per defaltam, *W.* 2. cap. 4. Reg. 171.

Rex, vic. Lincoln, *ſalutem. Præcipe* A. *quod, &c. reddat* B. *quæ fuit uxor* C. *unum meſſuagium cum pertinentiis in* N. *quod clamat eſſe rationabilem dotem ſuam*, vel ſic, *quod clamat eſſe de rationabili dote ſuâ, & quod idem* A. *ei deforceat ut dicit, &c.*

Writ of Dower loſt by Default, *Weſt.* 2. 13. *Ed.* chap. 4.

'THE King, to the Sheriff of *Lin-* 'coln, Greeting. Command *A.* that, *&c.* 'he render to *B.* who was Wife of *C.* 'one Meſſuage with the Appurtenances 'in *N.* which ſhe claims for her reaſon- 'able Dower, *or thus*, which ſhe claims 'to be Part of her reaſonable Dower, 'and from which the ſame *A.* deforces 'her, as ſhe ſays, *&c.*'

AND if the Tenant in Frank Marriage bring ſuch Writ, then the Writ is:

De maritagio amiſſo per defaltam. Reg. 171.

Quod reddat E. *unum meſſuagium, &c. quod clamat eſſe jus & maritagium ſuum, & quod idem* A. *ei injuſte deforceat, &c.*

Of Marriage Portion loſt by Default.

THAT he render *E.* one Meſſuage, ‘ *&c.* which ſhe claims to be her Right ‘ and Marriage Portion, and from which ‘ the ſame *A.* unjuſtly deforces her, ‘ *&c.*’

AND if he is Tenant in Tail then the Writ is:

De feodo talliato amiſſo per deialtam. Reg. 171. b.

Quod juſte, &c. unum meſſuagium, &c. quod clamat tenere ſibi et hæredibus de corpore ſuo exeuntibus, et quod prædictus A. *&c.*

Of a FeeTail loſt by Default.

‘ THAT juſtly, *&c.* one Meſſuage, ‘ *&c.* which he claims to hold to him ‘ and the Heirs of his Body iſſuing, and ‘ from which the aforeſaid *A. &c.*’

IT is good without ſhewing of whoſe Gift it is in his Count, 29 *E.* 3. 47. 30 *E.* 3. 31. For the Writ is brought only after a Recovery by Default of his own Seiſin; therefore who made the Gift is not material, but Matter of Evidence only; and conſequently need not be ſet forth in the Count—And for Tenant for Life the Writ is:

De tenemento ad termin. vitæ amiſſo per defaltam. Reg. 171. b.

Quod, &c. reddat B. *unum meſſuagium, &c. quod clamat tenere ad terminum*

num vitæ ſuæ, & quod prædictus A. *ei injuſte deforceat, &c. et inſi, &c.* *

'THAT, *&c.* he render to *B.* one 'Meſſuage, *&c.* which he claims to hold 'for the Term of his Life, and from 'which the aforeſaid *A.* unjuſtly defor-'ces him, *&c.* and unleſs, *&c.* *

Of a Tenement held for Term of Life, loſt by Default.

(OR for Tenant by Curteſy.)

Quod clamat tenere per legem Angliæ, *& quod prædictus* A. *ei injuſte deforceat, &c.* †

Per legem *Angliæ.* Reg. 171. b.

'THAT he claims to hold by the Law '(Curteſy) of *England*, and from which 'the aforeſaid *A.* unjuſtly deforces him, '*&c.* †

By the Law (*Curteſy*) of England.

AND the Regiſter is, that the Writ for Tenant by the Curteſy, is by Equity of the Statute—But if the Tenant in Tail or

* *Non dicatur* injuſte *deforceat, quia le* (injuſte) *non habetur in ſtatuto. Reg. ibid.*

* *It ſhould not be ſaid* unjuſtly *deforces, becauſe the* (unjuſtly) *is not in the Statute. Reg. ibid.*

† *Iſtud Br. pro tenentibus per legem* Angliæ *non continetur in ſtatuto, ſicut alia, Br. præcedentia, ſed poteſt manuteneri per idem ſtatutum, &c. Reg. ibid.*

† *This Writ for Tenants by the Law* (Curteſy) *of* England, *is not contained in the Statute, as the other preceding Writs, but it may be maintained by virtue of the ſame Statute, &c. Reg. ibid.*

ſuch other Tenant, who hath a particular Eſtate, loſe by Default, where he is not ſummoned, &c. then he may have a Writ of Deceit, or *quod ei deforceat*, as he pleaſes.——

If a Man loſe by Default in an Action of Waſte ſued forth againſt him, he ſhall not have a *quod ei deforceat*; for the Verdict which found the Waſte, ſee 3 *H.* 6. 29. By *Ralph Brook*, *quod ei deforceat* 7. *dubitatur*.

And if a Man loſe any Land by Default, in a Writ of Right, in a *Court Baron*, he may remove the Record into the *Common Pleas*, and have a *quod ei deforceat* upon that Record, and ſo ſhall have the *quod ei deforceat*, although he do not remove the Record; but then it ſeemeth, that the *quod ei deforceat* ſhall be ſued in the *Common Pleas*, or in the *Court Baron* where he loſeth the Land, as he pleaſeth; *tamen quere*.

Note, upon Recovery by Default in the *Court Baron*, *quod ei deforceat* lies in the Court of the King; and therefore it is no Iſſue to ſay, *Nul tiel record*; but he ought to ſay no ſuch Record or Recovery, by which it appears, that the Tenements were loſt by Default, 2 *Ed.* 4 11. 10 *Ed.* 4. 2. 10 *H.* 7. 9. 6 *H.* 43.

In the *quod ei deforceat*, it was enough for the Plaintiff to ſhew, that he was a Feu

Feu for Life, by the Curteſy, or in Dower, *&c.* and he was not obliged to ſet forth the Recovery in his Writ or Count, but that came on the Defendant's Side; and he may plead that there was no ſuch Record or Recovery, in Abatement of the Writ; for he might recover by *Aſſize*, or Writ of Dower; and it would have been impertinent to have clogged the Plaintiff's Writ or Count with a Recovery by Default, becauſe this is Part of the Defendant's Title, and therefore comes properly on his Side to ſhew it; and if there be no ſuch Recovery by Default, the Defendant muſt ſet it forth in Bar, and alſo his Title; as if it be by a Gift in Tail and he had recovered by Default in a *Formedon*, ſhe muſt ſet forth the Gift in the *Formedon*, the Default, and Recovery, and ſay that he is * *paratus manutenere jus & titulum per donum predict.* And the Defendant, by way of Replication, may traverſe the Gift, or traverſe the Seiſin of the Donor, *Raſt. Entr.* 537. but the Plaintiff can never traverſe the Recovery, becauſe that is the Foundation of his own Writ; but if the Defendant traverſe it in Abatement of the Plaintiff's Writ, if the Record be in a *Court Baron*, then it may be removed by *Re-*

* *Ready to maintain his Right and Title by the Gift aforeſaid.*

Recordare into the *Common Pleas*; but if the Recovery by Default be in a Court of Record, it muſt be removed by *Certiorari* and *Mittimus.*

AND the *quod ei deforceat* lieth againſt a Stranger to the Recovery; as if a Man recovers by Default, and maketh a Feoffment after the *quod ei deforceat* ſhall be brought againſt the Feoffee. 44 *E.* 3. 43. accordingly. Dubit. 11. *E.* 3. 30. *quod ei deforceat.* 5.

AND if a Woman loſe by Default, and taketh Huſband, ſhe and her Huſband ſhall have the *quod ei deforceat*; but if Ten. in Tail loſeth by Default and dieth. his Heir ſhall not have the *quod ei deforceat*, but a *Formedon*, for that is his Writ of Right.

WHERE a Woman hath Dower aſſigned to her in *Chancery* for the Nonage of the Heir, who is in Ward to the King, and afterwards the Heir at full Age ſueth a *Scire facias* in the Chancery againſt the Wife, to avoid that Endowment, and recovereth in that *Scire facias* by Default of the Wife; now the Wife ſhall have a *quod ei deforceat* in that Caſe in the *Common Pleas* upon that Recovery.

AND ſo if a Man recovers in the *King's Bench* any Land by Default upon *Scire facias* ſued out upon a Record, which is there,

there, the Tenant who loſt by Default, ſhall have his *quod ei deforceat*, and ſhall ſue the ſame in the *Common Pleas*.

If two Coparceners, Tenants in Tail loſe their Lands by Default, they ſhall join in a *quod ei deforceat*, and yet the Default of one is not the Default of the other, M. 46 *E.* 3.

And in a *præcipe quod reddat*, if Tenant for Life, or in Tail appears, and after depart in deſpight of the Court, he ſhall loſe his Land; and yet he ſhall have a *quod ei deforceat*, for that the Recovery is by Default, becauſe he did not appear when he was demanded; and if Tenant in Tail or for Life, after the Miſne joined in a Writ of Right, depart in deſpight of the Court, he loſeth his Lands; and there he ſhall not have a *quod ei deforceat*, becauſe Judgment final ſhall be given againſt him in that Caſe.—The Reaſon of the Diſtinction in the foregoing Caſes ſeems to be, becauſe in a *præcipe quod reddat*, in Entry, the Plaintiff only recovers Seiſin; and therefore in this Caſe, the *quod ei deforceat* lies, which was intended in this particular Caſe, inſtead of the Writ of Right for theſe Tenants; but where the Miſne was joined upon the meer Right, and the Tenant departed in deſpight of the Court, Judgment final was

given againſt him, and there could be no new Writ of Right; therefore in theſe Caſes, no Writ of *quod ei deforceat* was given inſtead thereof.

If the Huſband and Wife be ſeiſed of Land in Right of the Wife, for Life of the Wife, and they loſe the Land in a *præcipe quod reddat* by Default, yet they ſhall have a *quod ei deforceat.*

And if Tenant for Life loſeth his Land in a *Ceſſavit* brought againſt him by Default, yet he ſhall have a *quod ei deforceat* by the Statute of *Weſt.* 2 *H.* 5 c. 3. and *M.* 6. *E.* 3. becauſe the Lord in this Caſe, as in all other Caſes by Default, maketh Title by the *Ceſſor* in Maintenance of the Default.

And if a Tenant by a Receipt upon the Default of Tenant for Life appeareth, and is received, and pleadeth, and afterwards loſeth by Action tried; yet the Tenant for Life ſhall have a *quod ei deforceat*, for the Judgment is given againſt him by his Default, 23 *E* 3. *quod ei deforceat* 17. 8 *H.* 4. 6. 33 *E.* 3. *Avowry* 255. And if the Tenant vouch, and the Vouchee will not appear, for which the Tenant loſeth by Default of the Vouchee, it is to ſee whether the Tenant ſhall have a *quod ei deforceat*; for he loſeth the Land by Default;

fault; for the Statute is,* *Et cum temporibus retroactis aliquis amisisset terram suam per defaltam, non habuit aliud recuperare quam per breve de recto,* and there it doth not say, *per defaltam suam,* but only by Default; but after in the Statute it sayeth † *Provisum sit quod de cætero non sit eorum defalta eis ita præjudicialis, &c.* And by that it seemeth, that the Default of the Vouchee is the Default of the Tenant, and so Default in both.—*Quere* of Statute; but if the Tenant vouch, and the Vouchee appeareth, and entereth into the Warranty, and afterwards loseth by Default; now, if the Tenant lose by the Default of the Vouchee, he shall not have a *quod ei deforceat,* because he shall have Judgment to recover over in Value against the Vouchee, by Default of the Vouchee, so as he shall have a Recompence; but if the Vouchee doth not appear, but maketh Default, then he shall lose the Land by Default of the Vouchee, but that is not the Default of the Tenant, and therefore *quere* of that Case. *West.* 2. 13 *Ed.* chap. 4. 2 Inst. 349.

If the Vouchee does not appear, it is the Default of the Tenant, in not bringing

* *And whereas in Times past, when any one had lost their Land by Default, he had no other Remedy to recover than by Writ of Right.*

† *It is provided, that for the future their Default shall not be so prejudicial to them.*

ing his Voucher at the Day, in order to defend his Title; therefore the Demandant recovers upon the Default; and by Conſequence this Writ lies for the Tenant that loſes upon ſuch Default, who becomes Demandant in a *quod ei deforceat*, to make the former Demandant ſhew his Title, on which he could maintain his former Writ: indeed, if the Vouchee comes in, and after make Default, no Writ of *quod ei deforceat* lies.

But ſuch Recovery may be pleaded as a Bar to the *quod ei deforceat*, becauſe the Demandant in the former Action had Judgment to recover in Value, and therefore, having the Recompence by the former Judgment, he could never maintain the Writ to recover the Thing itſelf; but in the former Caſe, the Vouchee not appearing at all, there could be no Judgment for the Recompence in Value; and if the particular Tenant had not this Writ, he would be without Remedy, and this is the Reaſon, why in a Common Recovery, the Tenant in Tail cannot implead the Recovery in a *quod ei deforceat*.

And if Huſband and Wife loſe by Default the Land of the Wife which ſhe holdeth for Life, if the Huſband dieth, ſhe ſhall not have a *quod ei deforceat*, but a *Cui in vita*; for it is a Demiſe made by

the Husband. The Statute of *Westm.* 2. cap. 3. expresly gives a *Cui in vita* in this Case, therefore not within the Statute which gives the *quod ei deforceat.* And when he bringeth the *quod ei deforceat*, he counteth that he was seised of Land in his Demesne, as of Freehold, or in his Demesne in Tail, without shewing of whose Lease or Gift he was seised; and he ought to alledge *Esplees* himself, *&c.* We have already mentioned why he need not mention of whose Lease or Gift he holds in the Count or Writ; but only in general say, that he himself was seised *ut supra*, because to alledge it generally, was sufficient to intitle himself to the Writ, because he lays the *Esplees*, which shews the Seisin; and if he shews the Seisin, he need not say of whose Gift, because the Ouster is of that Seisin, which he has laid to be actually in him; and then the Defendant ought to deny the Right of the Demandant, and shew how that at another time he recovered the Land against the Demandant by *Formedon*, or other Action; and shall say, at the End of the Plea, * *Quod ipse paratus est ad manutenendum jus et titulum suum præd. per donum præd. et unde petit judicium, &c.*

* *That he is ready to maintain his Right and Title aforesaid, by the Gift aforesaid, and thereof desires Judgment, &c.*

&c. And then the Demandant in the *quod ei deforceat*, ſhall traverſe that Title, or may ſhew Matter to bar that Title, *&c.* but he ſhall not make Defence, and then plead in Bar, as he ſhall do in the *Formedon.* The Meaning of this is, that in the *Formedon*, after the Defendant has entered into the Defence; that is to ſay, * *Venit et defendit jus ſuum quando, &c. et dicit quod præd.* (the Plaintiff) *Action. ſuum verſus eam habere non debet, quia dicit, &c.* and ſo ſhews Matter to defend himſelf from the Plaintiff's Action; but in the *quod ei deforceat*, the Defendant, by way of Bar, is to ſet up his former Recovery by Default, and protect that Recovery by Title, and ſo aver the Defence of that Title whereby he recovered; therefore it would be very improper for him to ſay, † *Actionem ſuam verſus eum habere non debet*, becauſe the Statute has expreſly given the Action; where there was a Recovery by Default; and to begin his Defence in that Manner, would be an Averment againſt the Statute.

* *Comes and defends his Right, when, &c. and ſays, that the aforeſaid* (the Plaintiff) † *Ought not to have his Action againſt him, becauſe he ſays, &c.*

The END

THE

HISTORY and PRACTICE

OF THE

COURT of KING's BENCH.

THE ORIGIN OF THE KING's BENCH.

THE civil Side of the *King's Bench* commences on Suppoſition of a Treſpaſs committed by the Defendant in the County where he reſides, and he is taken up by Proceſs of that Court as the Sovereign *Eyre*, and being committed to the Marſhal, he may be declared againſt in any civil Action whatſoever.

THE firſt Proceſs therefore is a Bill either real or feigned, which is ſign'd by the Maſter of the Office, who, as Clerk to the Court, iſſued the Proceſs, but the *Latitat*, which is founded on the Bill, and went to the Sheriffs, where the *Eyre* had no natural Juriſdiction, went out in the King's Name, and was *teſted* by the Chief Juſtice, becauſe the King had an univerſal Juriſdiction over all his Subjects, and conſequently could call any of them that fled from the Juſtice of his own *Eyre*: The ſignable Writs in the King's Name are likewiſe ſealed at a different Office, that one Office may be a Cheque to another.

Bill of *Middleſex* and *Latitat*.

Signable Writs.

BY the common Law all Perſons were put in *Decenna*, and the whole Frank-pledge anſwerable for

Of Bail.

each other; but when the Nation grew too populous for that Regimen, every one was obliged, when called upon by a proper Authority, to find Securities for their good Behaviour, and is now obliged ſo to do in Matters that will not bear a criminal Proſecution; for all Offences which they called * *Crimina majora*, where at leaſt there was a Fine to the King, if not capital Puniſhment, the *Capias* lays; but in leſs Offences, there was only an Amerciament, and for that a *Diſtringas*, only Debts were contracted upon the Credit of the perſonal Eſtate of the Borrower, and therefore Proceſs at common Law lay only on the perſonal Eſtate by Attachment and Diſtreſs on the Proceſs, and *Fieri facias* on the Execution.

Where a Cap. lay at the common Law.

Attachment and Diſtreſs.

Difference of the Diſtringas in the Courts below.

In the Courts below the Property could not be altered, becauſe it is a Rule, no Property will alter in the Subject without his Conſent, or a Writ of the Prince, therefore on a *Diſtringas* in the Courts below, the Goods are not forfeited, either upon Meſne Proceſs, or after Judgment on the *Levari facias*, but are only a Pain to make the Parties appear on the Proceſs, and make them pay the Money awarded on the Judgment; but then they had a Writ † *de Executione Judicii*, which impowered the Sheriff to alter the Property of the Goods.

The Courts above.

But in the Courts above, on Non-appearance on the *Diſtringas* and Attachment, the Goods were actually forfeited, and the Execution altered the Property.

52 Hen. 3. 53 Ed.

The Statute of *Marlbridge* made the Lords Bailiffs to account in Cuſtody, as the King's Accountant did, and ſo gave a *Capias* in Account, and that of *Weſtminſter* an *Elegit*.

By

* *Greater Crimes.* † *Of the Execution of the Judgment.*

By the Words of *Marlbridge* the Bodies are to be attached, if they have nothing by which they may be ſummoned; hence it is the Sheriff muſt return on the Original, * *Nihil habet in balliva mea per quod ſummoneri poteſt*, to warrant the iſſuing out of the *Capias*; the Party, by the Statute of *Weſtminſter*, was repleviſeable at the Diſcretion of the Court, and therefore they have fixed a Sum, upon which the Party is to be let out on his own Security, which is now under 10 *l.* if it is that or a greater Sum, then he is to give in Caution; the Heir, Executor, or Adminiſtrator, being not ſued for a Debt of his own, his own Security is ſufficient; againſt a Peer, he being always preſumed to have an Eſtate in Land, no *Capias* lays; Analogous to this, the *King's Bench* have obliged them to file common Bail, to give them a Juriſdiction under 10 *l.* and if that, or a greater Sum, ſpecial Bail as in the *Common Pleas.*

When the firſt Cap. was given.

When Court had Power to take Bail.

According to the ancient Practice, the Original gave Notice of the Plaintiff's Demand, and upon the Return of that Original, if the Defendant did not *Eſſoyn* on the *Eſſoyn* Day, he was obliged to appear on the Appearance-day, and the Plaintiff was to be ready to count, and the Defendant to plead, and ſo they put the Point in Iſſue either by Demurrer or Trial *per pais*, the ſame Term, and originally all Buſineſs was determined the ſame Term, the Original was returnable in; unleſs it was adjourned for Difficulty, or to be tried in the Country by a Jury; the very Notion of Terms originally being the ſame as the Commiſſioners of *Oyer* and *Terminer* at this Day, which are to diſpatch all Buſineſs that comes be-

Of the Original.

Eſſoyn-day.

Appearance-day.

Terms.

* *That he hath nothing in my Bailiwick whereby he can be ſummoned.*

fore them; afterwards when the Statute of *Weſtminſter* 2d, gave Power to every Body to appoint his Attorney; there were Numbers of Attorneys that attended the Courts, and inſtructed the Serjeants in their Clients Cauſe, for which the Court allowed them a proper Time, and as they had four Days to appear in after the Return of the Writ, ſo they gave them four Days to plead in after the Appearance.

But in the *King's Bench*, the Perſons who were arreſted by *Latitat* or *Bill* of *Middleſex*, were privileged in all Suits againſt them; from hence it is, that when he came up to be bailed, all Perſons might declare againſt him, but to ſuch Declaration they were obliged to give an Imparlance till the next Term, becauſe the Defendant not coming in by Original, which ſhewed the Cauſe of Complaint, he muſt have Time till the next Law-day to put in his Anſwer; and as in the *Common Pleas* a Defendant had four Days to appear, and afterwards four Days to plead in, ſo they gave the Priſoner eight Days to plead *in lite*, being to the firſt Day of the Term, and the Writ on the *Eſſoyn* Days.

All other Perſons but he who ſued out the *Latitat*, were obliged to declare againſt him the ſame Term he appears, but he to whom he hath given a Warrant to appear, which is always in purſuance of the Action, may charge him the ſecond Term with a Declaration, but it muſt be in the ſame Action.

When a Priſoner hath given in a Warrant of Attorney to appear at the putting in Bail in the Cauſe in which he was arreſted on the Action, it is an Undertaking of the Attorney to receive a Declaration the next Term, and therefore the Plaintiff cannot be non-proſecuted till after the ſecond

cond Term, ſince the Defendant hath an Attorney in Court to receive the Declaration.

When the Action was laid in *London* or *Middleſex*, and they found an Inconvenience to give the Defendant an Imparlance till the next Term, when it was either *Hilary* or *Trinity* Term, theſe two being ſo ſhort, and eight Days being allowed to plead in, the Defendant, if the Proceedings were long, or he trickiſh, might delay the Plaintiff the long Vacation following; ſo that when a Defendant was arreſted on the firſt Return of *Eaſter*, and Declaration delivered before the *Eſſoyn* Day of one Month of *Eaſter*, he was obliged to plead four Days before the *Eſſoyn* Day of *Trinity*; if he was arreſted on a Writ returnable the firſt of *Michaelmas*, and the Declaration delivered before the *Eſſoyn* Day of the Morrow of *All Souls*, he was obliged to plead four Days before the *Eſſoyn* Day of *Hilary*, correſpondent to this the *Common Pleas* altered their original Practice; and in Originals which came in after the ſecond Return, they gave Leave to imparle till the next Term, but the Declaration muſt be delivered before the *Eſſoyn* Day of the next Term, becauſe it muſt be a Declaration of that Term in which the Original is returnable; but the enlarging the Time for the Delivery of the Declaration, anſwered but one Advantage of the *King's Bench* Practice, for the Authority of the Court being founded on the Original, they could not depart from it without Error, therefore they invented a new Way of arreſting in Treſpaſs, and afterwards declare againſt the Defendant in another Action, and filed an Original to warrant the Declaration: Thus two Originals were filed, the one to warrant the *Capias*, the other the Declaration; this laſt Original muſt be beſpoke within ſeven Days at far-

theſt of the ſecond Term, that ſo the Time to plead in Abatement being expired, the Writ might be more certainly form'd from the Declaration, without any Danger of being afterwards objected to, after the 13 *Car.* 2. Stat. 2. c. 2. which required the Cauſe of Action, ſhould be inſerted in the Writ on which the Defendant was arreſted; it was thought the *Common Pleas* Practice of *Clauſum fregit* would be defeated, but my Lord Chief Juſtice *North* * invented the Actions which put them again on the Level with the *K. B.* On Diviſion of the Courts the *Chancery* was the *Officina brevium* to make out all Writs in which the *Common Pleas* was to proceed, and theſe were returnable into that Court, that they might be Cheques to each other, and a true Account kept of the Revenue proceeding from them, and therefore a † *Cuſtos brevium* was made in the *Common Pleas*, to keep and file the Originals, which were Warrants for the Courts Proceedings, and which could by no means be taken away; and hence they pleaded to the Original, if it did not give the Court ſufficient Authority, and from thence came the Objection of want of Form, and not agreeing with the Regiſter, for the *Common Pleas* would not let the *Chancery* alter their Proceedings, leſt it ſhould make a Variance in the Law itſelf.

THERE were in the *Chancery* two Sorts of Writs, *viz.* ‡ *Magiſtralia brevia*, and ‖ *de curſu*; theſe laſt were formed in the King's Court before the Diviſion, and reduced into a Regiſter, and lay in *Chancery* ready to be made out; upon theſe the Plaintiff put in Pledges of Proteſtation, ſometimes in *Chancery*, ſometimes before the Sheriff; the ‡ *Brevia Magiſtralia* were made out by the Maſters on the Statute of *Weſtminſter* 2. which im-

* *See his Lordſhip's Life in 4to, p.* 99, 100, *printed in* 1742.
† *Keeper of Writs.* ‡ *Magiſterial Writs.* ‖ *And of Courſe.*

impowers them to make out Writs ſuitable to every Man's Caſe; the Maſters, whenever a new Caſe came, met and form'd a Writ accordingly, which was entered into a Regiſter, afterwards, in the Time of Chancellor *Bacon*, the Curſitors Office was ſet up, from whence came all original Writs, and the Maſters totally employed on the Equity Side, when the Originals were returned and filed by the *Cuſtos brevium*, they were Authority for the *C. P.* to make out Proceſs, which the Philazer did from the Files, and was thence called Filazer.

The Reaſon of the Difference of the Return in *K. B.* and *C. P.*

In the *King's Bench* their Writs are returnable at a Day certain, as on *Monday* next after, becauſe their Juriſdiction being originally confined to the County where the King reſided; a Week's time was thought ſufficient for the Sheriff to return any Proceſs belonging to that County, ſo that it is in the Court's Diſcretion to make their Writs returnable what Day they pleaſe, provided there be a Week from the *Teſte* to the Return; but in the *Common Pleas*, which reaches all over *England*, there muſt be fifteen Days between the *Teſte* and Return, that being eſteemed a reaſonable Time for the Sheriff of any County in *England* to return the Writ.

But in the *King's Bench* where the Writs are returnable, *whereſoever we ſhall then be in England*, there muſt be fifteen Days between the *Teſte* and the Return, that the Sheriff may have ſufficient Time to follow the Court.

There is not one Caſe now in the *King's Bench*, where they have fixed a Time, which ſays, that there muſt be fifteen Days betwixt the *Teſte* and the Return of a *Capias ad ſatisfaciendum*, when 'tis to charge the Bail, ſee Executions, p. 73.

It

It is not ſufficient to give the Court Juriſdiction over a Priſoner, that he ſhould be in Cuſtody of the Marſhal; but it muſt likewiſe appear by the Acts of the Court, that he comes into Court the ſame Term he is charged with a Declaration, and it is Error to declare of any Term in which Bail is not filed, for tho' it ſhould appear by the Return of any *Habeas corpus*, or any other Writ, that he is in Cuſtody of the Marſhal, yet that will not be ſufficient to warrant the Declaration, ſince they might declare againſt him in his Abſence; and 'tis to be ſuppoſed, when any Party was delivered in Bail, he was charged with all the Declarations then in Court againſt him, for it would let any Body declare againſt one in his Abſence.

N. B. If a Priſoner be diſcharged for want of being declared againſt within two Terms, or upon Men proſecuting the Plaintiff, or if he ſurrender himſelf in diſcharge of his Bail, and is not charged within two Terms with an Execution; in all theſe Caſes he muſt file common Bail, that it may appear by the Acts of the Court that he was privileged, and actually in Court when diſcharged.

In the *Common Pleas* the Serjeant for the Plaintiff counted * *Ore tenus* in *French*, which was minuted by the Prothonotary, and this was done the ſame Term the Writ was returnable; as the Defendant's Serjeant was not ready, he craved Time to Anſwer (which they called Imparlance) till the ſubſequent Term, then the Plaintiff's Serjeant counted over again, and the Defendant's Serjeant pleaded, which Pleadings were likewiſe entered by the Prothonotary, and Copies made for each Party, that they might ſee whether the Entries were rightly made, the Proceedings of the first

* *By Word of Mouth.*

firſt Term they call'd the Imparlance-roll, and those of the ſecond Term the Plea-rolls. N. B.

If Feme Covert be arreſted, ſhe ſhall file common Bail before ſhe is diſcharged, becauſe if the Huſband, on the Arreſt, would not give an Appearance for her, the Plaintiff could not proceed to receive Judgment.

Before the Statute of 26 *E.* 3. cap. 15. the Court, upon Propoſal of the Declaration and Plea judged the Legality of it, and if either were vicious, they counted again, or pleaded *De novo.*

From hence it is, that a Plaintiff ſhall not diſcontinue without Leave of the Court, after a Demurrer entered, Verdict, or Writ of Enquiry, becauſe they commonly aſk the Opinion of the Court, and if they would enter contrary to the Court's Opinion, they would not let them withdraw their Pleadings without their Leave.

When by this Statute the Pleadings in *French* were taken away, they began to plead as they would ſtand by, and the Court would not adjudge but on the Pleadings in Paper, and afterwards on Entries made on the Roll; upon this, inſtead of counting in Court, Pleadings were delivered into Court while the Prothonotary entred on Paper, and delivered over Copies to the other Side, in order that the whole Proceedings might be ſettled exactly, from thence the Rolls were made up, and upon theſe Proceedings the Court gave their Judgment.

In the *Common Pleas*, the Defendant pays 4 *d. per* Sheet for Copy of the Declaration, and 8 *d. per* Sheet for the Entry of all his own ſpecial Pleadings; when he is at Iſſue, and joins in Demurrer, he pays the Plaintiff's Attorney 4 *d. per* Sheet for a Copy of the whole Proeeedings.

Local

LOCAL and tranſitory Actions differ in this, that in the former Summons upon the Land is neceſſary, but in the other the Party is followed in any County till he can be found.

ORIGINALLY all Actions were tried in their proper County, which was the Law, according to the Maxim * *Vicini vicinorum facta præſumuntur ſcire*, nor could any Perſon fly from the Juſtice of the Place, becauſe he was put in *Decenna*, which obliged him to anſwer in the Place where he reſided; when the Seminaries were broke, the Buſineſs came up into the King's Courts, which having Juriſdiction all *England* over, they followed the Party by the Proceſs, whereſoever he was to be found, and declared againſt him in the County, and the Place not being material, they could try it in the Place where the Action was; but this Method got Vexation to the Defendants, who were obliged to carry their Witneſſes to what Place the Plaintiff laid his *Venue*, and therefore on Motion to the Court before Iſſue joined, they would oblige the Plaintiff to alter his *Venue* to the Place where the Action accrued, or elſe that he ſhould give the Evidence in the County where it was laid.

THIS is not an arbitrary Proceeding, but Conſtitution of the old Law, which commanded all Facts to be tried where they were done; and it ſeems, when the Buſineſs came into the King's Courts, on the civil Side, it was no Plea to the Juriſdiction of the Court, to ſay the Fact was done in another County, the King's Courts having the Juriſdiction in all Counties; wherefore the Defendant not having the ſame Advantage as in the Courts below, he was neceſſitated to

* *Neighbours are ſuppoſed to know their Neighbours Tranſaction.*

to apply to the Court to compel the Plaintiff to give Evidence in the County where the Action really accrued: This was eaſily done in the *King's Bench*, when declaring againſt Defendant as a Priſoner, they might lay the *Venue* in any County, but in the *Common Pleas* before the *Ac etiam* in Treſpaſs, they were not only obliged to alter the Declaration but the Writ; but ſince that Invention, the Original being ſued out ſubſequent to the Declaration in point of Time, the purchaſing the Writ to warrant the Declaration is ſufficient.

THE Plaintiff after the firſt Term ſhall not alter his *Venue*, becauſe the Record is out of the Power of the Court to change, without Conſent; but during the ſame Term it may be altered, being only in *Fieri*.

BUT it is no ſufficient Cauſe to have the *Venue* altered on a Suggeſtion, that the Plaintiff has too much Influence in the County where the Action is laid; but there muſt be an Affidavit that the Fact was done in another County, becauſe each Fact muſt be tried where it was done, and the whole County ſhall not be ſuppoſed to be partial. 2 Mod. 216. Vent. 364, 365.

IN all Pleas to the Juriſdiction, the Priſoner is obliged to plead *inſtanter*, becauſe if he imparled, he acknowledged the Juriſdiction of the Court by aſking Leave; if he imparled generally, it was to plead in chief, for which he had eight Days in the ſubſequent Term; but if he had any thing to plead in Abatement, he muſt have the ſpecial Leave of the Court for that Purpoſe, and then he had the ſame Time as when he pleaded in chief in the *Common Pleas*; it is four Days to plead in Chief or in Abatement, after ſpecial Imparlance.

IF the Defendant imparles, and dies after the Day in Bank, yet if a Rule to plead be given,

Judg-

Judgment ſhall be ſigned; 'tis no Plea, becauſe 'tis the Favour of the Court to indulge him with Time to plead in after his Imparlance is expired, and the Favour of the Court to the Defendant ſhall not turn to the Plaintiff's Diſadvantage.

If a Plaintiff does not enter the Iſſue the ſame Term it is joined, there will be nothing of Record of that Term, and by Conſequence there muſt be an Imparlance; and when he hath * *Licentia interloquendi*, he has neceſſarily Time to plead *de novo*; but he muſt plead within fifteen Days, which is the uſual Time given if he had not pleaded at all.

All Judgments muſt likewiſe be entered the ſame Term Rules are given; for there muſt be a Continuance from the Term the Declaration is filed, till that wherein Judgment is ſigned, which Continuance before Iſſue joined is by Imparlance, gives the Defendant an Opportunity of Pleading.

The Act of the Court of delivering the Priſoner to Bail being of Record, intitles the Plaintiff to a *Scire facias*, when it appears the Defendant hath not ſatisfied the Judgment; hence it appears a *Capias* muſt be returned againſt the Principal before a *Scire facias*, to warrant it againſt the Bail in a *Scire facias*; in the *Common Pleas* there muſt be fifteen Days between the *Teſte* and Return, becauſe that is to ſummon a Perſon in any County, but ſeven Days in *B. R.* when by Bill being ſuppoſed to be delivered to a Perſon within the County where the ſovereign *Eyre is* held; but if upon a Writ of Error, unleſs the Suit in *Common Pleas* was for or againſt a privileged Perſon or by Original, the Practice the ſame as in *Common Pleas*.

If

* *Leave to imparle.*

If the Defendant gives Judgment with Stay of Execution, till a certain Day, the Plaintiff may ſue out a *Capias* returnable before that Day, to warrant an Arreſt into another County; but it would be irregular, that the firſt *Capias* ſhould affect the Bail by warranting a *Scire facias* againſt him, becauſe the Judgment at that Time was of no Force againſt the Principal, and therefore affects not the Bail, till the Principal was deficient, ſo that if an Attorney ſhould ſue out a *Scire facias*, on ſuch *Capias ad ſatisfaciendum*, the Court would interpoſe. Writs of Error are common out of the *Chancery* to a ſuperior Court to examine the Proceedings of an inferior Court, and therefore lie from the *Common Pleas* to the *King's Bench*, the Juſtice in *Eyre* making all other civil Suits to ceaſe in the Counties where they came, becauſe they had a Power in civil and criminal Pleas, and the *King's Bench* is the ſovereign *Eyre*, where the King is ſuppoſed to ſit in Perſon, and therefore there were examined all Errors on the civil Side; but from the *King's Bench* there was no Writ of Error but into the Houſe of Lords, and then they did not part with the Record, but the chief Juſtice compared a Roll with the Record, which Roll he carried up to the Houſe of Lords for them to give Judgment on; and if Judgment was reverſed, a *vacatur* was entered on the Record below; but if it was affirmed, Execution was alſo taken out below, becauſe the ſupreme executive Power was in the Prince, and therefore went out of his own Court; and it is a Maxim, he never parts with the Records out of his own Court; (this was the ancient Practice) but by the Statute of 27 *Eliz.* cap. 8. Writs of Error lie from the *King's Bench* into the *Exchequer* Chamber in Actions of Debt, Detinue, Covenant, Account,

count, Actions on the Caſe *Ejectione firma*, Treſpaſs firſt commenced or to be commenced, there confines the Power of the *Exchequer* Chamber, Actions commenced in *B. R.* by Privilege, and not by Original, ſince that commences in the Court of *Chancery*.

In the Court of *Common Pleas* the Record itſelf was certified, but before the *King's Bench* was ſettled at *Weſtminſter*, the chief Juſtice of the *Common Pleas* would not ſend the Record unleſs the Plaintiff would pay for a ſafe Hand, and unleſs the Plaintiff in Error came to ſuch an Agreement, he endorſed a *Non proſequi* upon the Writ of Error, which was in the Nature of a Certificate to the Chancellor, that the Plaintiff did not pay for the tranſmitting the Record after an exact Tranſcript was wrote, and the Record itſelf kept, which was found to be more convenient, becauſe it was not then ſubject to be loſt in the Tranſmiſſion, and the Tranſcript when entered above, becauſe the ſame Record that was below, and the Record below marked as tranſmitted, and therefore vacated there; and as they made the Plaintiff in Error pay for a ſafe Meſſenger to carry the Record, ſo they now made him pay for a Tranſcript as the ſafer Way of conveying it, and therefore Rules were given in that Court, to which the Writ of Error was directed, for the Plaintiff to tranſcribe within eight Days after the Return, or otherwiſe the Writ of Error to be *Non proſequi*.

Before the Record is tranſmitted, the Plaintiff in Error, by Statute 3 *Jac.* cap. 8. muſt put in Bail before the Judges below in every Action of Debt, for Rent, or by Contract; and by the 16 and 17 *Car.* 2. cap. 8. Bail muſt be put in after every Verdict and Judgment in all perſonal Actions of Dower and Ejectment, when it is made a

Record of the *King's Bench*, the Plaintiff in Error may ſue out a *Scire facias*, * *ad audiendum errores*, it being his Concern to reverſe the Judgement; or the Defendant in Error may ſue out a *Scire facias* † *quare executio non*, it being his Concern to reap the Benefit of his Judgment below, and the Defendant's *Scire facias* † *quare executio non*, becauſe his Writ is not to ſuppoſe Error in the Judgment he has obtained, and therefore needs not Non-proſs Writ of Error before he obtains Execution; but if the Plaintiff in Error, on Return of the *Scire facias*, aſſign no Error, the Defendant has his Execution; and if the Defendant in Error will have his Coſt on the Writ of Error, he gives the Plaintiff a Rule to aſſign Errors, and upon Default, the Defendant has his Coſt.

Tho' the Writ of Error be to ſend the Record and Proceſs ‡ *Cum omnibus ea tangentibus*, yet the Record only is ſent, and not the Original or Warrant of Attorney, or other Proceedings, becauſe, if they were all ſent up, it would be too voluminous and expenſive; but if the Plaintiff in Error had any particular Objection to the Original, or alledge Diminution, he may afterwards pray a *Certiorari* for that Purpoſe, ſo that theſe Words ſeem only to giving him the Liberty of having them upon any Occaſion, and it is to be intended a ſuperior Court *prima facie*, and the Original and Warrant of Attorney were Authorities for them to proceed.

But when the Plaintiff in Error avers againſt the Record, that there was no Original or Warrant of Attorney to authoriſe thoſe Entries on Record,

* *To hear Errors.*
† *Why Execution does not iſſue.*
‡ *With all belonging to them.*

there is a Day given, as there is in all other Pleadings of *Nul tiel Record* to bring it in; and if at that Day he does not bring a Certificate, for the Want of it he fails in the Iſſue, and it is to be ſtruck out of the Record, and upon the *Certiorari* they give him a Certificate of what remains below, and not the Writ itſelf, which ſhall remain on the File.

If the Plaintiff bring in an Original, which does not warrant the Record, the Defendant may ſue out a ſecond *Certiorari* to bring in the right Original, that ſo the Record may not be overthrown when there is ſufficient Authority to ſupport it.

Some Observations upon the preſent Conſtitution and the Practice of the King's Bench.

In the firſt Place it is to be obſerved, that here is the firſt Proceſs that brings Cauſes into Court, ſo that there ought to be not only Intereſt made, but all due Encouragement given to take out ſuch Proceſs; and that Intereſt is to be made chiefly by appointing ſuch Perſons to make out that Proceſs as have Intereſt in their reſpective Counties for which they officiate, and the more the Perſons be who are concerned and intereſted therein, the more in all likelyhood will they improve the Buſineſs of the Court, which is ſufficiently apparent from the *Common Pleas*, who have ſeparate Philazers for each particular County, and generally chooſe out of ſuch Perſons as are well known and intereſted among the Attornies of ſuch Counties, by which means their Philazers command, as it were, all the Counties in *England*; whereas the *King's Bench* has only one Officer to make out the *Latitats*, and ſuch a one as is generally put in for Cheapneſs, and not known to any Country Attorney

torney whatever, and conſequently not able to add to, or improve the Buſineſs of the Court in any reſpect whatſoever.

THEN as to the Encouragement which is the Price of the firſt Proceſs, the *Capias* in the *C. P.* coſts 3 *s.* 9 *d.* whereas the *Latitat* coſts 4 *s.* 3 *d.* and the entering common Appearance 2 *s.* in the *C. P.* but the common Bail in the *King's Bench*, coſts 2 *s.* 6 *d.*

THERE ſeems alſo an Inconvenience in the Manner of entering the *Latitats* upon the Rolls; for whereas in the *Common Pleas*, the Philazers enter the Writ at length with the *ac etiam*, and Sum contained; in the *King's Bench*, be the *ac etiam* for ever ſo much, they enter the County and Names, and *B. M.* for * *Boni manucaptores*, without either entering the Sum or Species of the Debt, ſo that the Writ may be afterwards altered, and can't be diſcovered if loſt; no Body can by the Roll find out what it was for, and by this are frequently occaſioned the Variances from the Writ in the Bills and Declarations, and thereby diſcharging the Bail for ſuch Variance.

IT is further to be obſerved with reſpect to the Philazer's-office in the *King's Bench*, that they are either entirely diſſuſed, or in the Hands of ſuch Perſons who take no care to promote them, and therefore they ought to go along with the *Latitats*, that the ſame Perſon may make out both Proceſſes; this way of Proceeding ſeems at preſent to be diſcouraged, by reaſon there is no Fee out of the Writ to the chief Clerk; but theſe little Fees are inconſiderable to what they would bring to the ſubſequent Proceedings and Entries, for there may be Proceedings by Original, had in all Caſes unleſs in Debt, Detinue, Covenant and

* *Good Bail.*

Account; and there is no Imparlance, nor can there be any Writ of Error but in Parliament, ſo that if due Encouragement was given to this Way of Proceeding, it would add very much to the Buſineſs of the Court, and 'tis a pity but the Court ſhould find out an Expedient, by making ſuch Alteration in the *Latitats*, ſo as to enforce the Defendant to plead without Imparlance to ſuch Actions as no Original lies in, and that would not only anſwer the Advantage of the Practices by ſpecial Original in the *C. P.* but ſave the Fine, and induce the Plaintiff rather to begin in the *King's Bench* than in the *C. P.* for the Matter of ſpecial Original is a Matter of great Conſequence.

It is further to be obſerved, that in the *Common Pleas*, there are three Prothonotaries and three Secondaries, Perſons generally created out of ſuch who have been very conſiderable in Practice, and of univerſal Acquaintance, and able thereby to promote the Buſineſs of the Court wherein they are ſo much intereſted; whereas, in the *King's Bench*, there is but one Secondary to do all the Buſineſs of three Prothonotaries, but not of equal Intereſt, and the Buſineſs of the Court ſeems too much for one to do; for in the firſt place, Buſineſs not meeting with Diſpatch, grieves the Practiſer; and perhaps being but one Place for Practiſers to apply to, may make the Officer leſs concerned whom he pleaſes or diſpleaſes, and this may alſo be aſcribed to the Place of the Clerk of the Rules.

It may be here alſo obſerved, the many References made to the Maſter, and the great Expence and Delay, and Fatigue thereof to the Suitors; for be there never ſo many Affidavits, each Party muſt take Office Copies, then the Inconvenience

nience of his Attendance, and his reporting * *Viva voce*, where neither Party has an Opportunity of knowing beforehand what he will report, nor indeed of hearing what he does report, and generally his Report (inſtead of turning upon the Point in queſtion) is only a Repetition of the Cauſe of Action, and the Proceedings had thereon, and the Affidavits of the Facts; whereas, if his Reports were drawn up conciſe, and ſhort, only with reſpect to the Matter in Queſtion; they might be filed with the Clerk of the Papers, or ſuch other Officer as the Court pleaſes to appoint, that each Party might take Copies, and the ſame be read audibly in Court.

Note, the *C. P.* makes no References, but determines all upon Motion.

It is further to be obſerved, that there is more Delay to Plaintiffs in the *King's Bench* than in the *C. P.* for the *C. P.* Rules to plead are but four Days, whereas the *King's Bench* Rules are eight, and even after ſuch Rules are out, if the Defendant pleads a ſpecial Plea, the Paper-book muſt be made up, which perhaps will be a Day or two more, and then the Clerk of the Papers gives a five Days Rule to return the Book, ſo that in the ſhort iſſuable Terms, 'tis next to an Impoſſibility for a Plaintiff to get either Judgment or Trial, if the Defendant pleaſes; and it is a very great Inconvenience, that the Rules of Practice are ſo very uncertain, that the *C. P's* Officers (by way of Ridicule) ſay, that the *King's Bench* are in nothing ſo certain, as being doubtful in every thing, ſo that the young Practitioners in the *King's Bench* are at a Loſs how to adviſe about the Practice: It is therefore very expedient, the Rules of Practice ſhould be more firmly ſettled than at preſent

* *By Word of Mouth.*

they ſeem to be; and here may be obſerved the Inconveniencies urged againſt the Office of the Clerks of the Papers, in as much as in the *C. P.* the Attornies have the Benefit of making up their own Books; whereas, in the *King's Bench*, the Plaintiff's Attornies are forced to have them made up by the Clerks of the Papers: This is ſaid to be a Grievance complained of on all Hands, as if the Clerks of the Papers were entirely needleſs, and the only unneceſſary and inſignificant Officers belonging to the Court, which how far they be ſo, may be conſidered of the better, by comparing them with ſome others; but 'tis further to be conſidered, that they purchaſe their Places, and have them for Life; ſo that if they be thought a Grievance, the beſt Way will be to purchaſe them out, which, 'tis thought, from the Tempers of the Perſons concerned, will be eaſily attained if deſired, both of them at this time being compliant in their Natures, and willing to ſhew their Duty and Obedience to the Court in any Matter that can be reaſonably required.

But it is here to be taken Notice of, that in the *C. P.* few or no ſpecial Pleadings are uſed, whereas there are a great many in the *King's Bench*, ſo that whether the Attornies would be capable of bringing the Pleadings decently before the Court of themſelves, may be a Queſtion; and if not, would utterly deſtroy the Nicety of Pleading, and the Education of young Gentlemen at the Bar as to that Part; for it may be ſaid with Strictneſs, that Nicety of Pleading is no where kept up but in the *King's Bench*, and the Attornies, rather than give extraordinary Fees, or run the Hazard of their own Judgment, would plead the general Iſſue; for it may be further obſerved, that to every Demurrer or Replication to a ſpecial Plea in the *C. P.* is required a Serjeant's Hand, whereas the

the Clerk of the Papers to all Demurrers, and in moſt ſpecial Pleas joins in Demurrer, or replies * *Ex officio*, without putting the Party to that Charge, and the Attorney is allowed as if Council had peruſed it, ſo that in every ſuch Book, the Plaintiff's Attorney gets 10*s.* 6*d.* and 'tis not once in ten, the Clerk of the Papers gets ſo much, and conſequently has no Reaſon to complain, ſuppoſing the Matter even reſted here.

But the making up of the Papers is not the only Buſineſs of the Clerk of the Papers, for it is out of them the Secondary is always choſe, ſo that they are to attend the Court conſtantly to perfect themſelves in Practice for this Purpoſe; they are to attend alſo to read all Affidavits, Records, Suggeſtions, and other Matters, and they are alſo to ſet down and marſhal all Cauſes and Trials at Bar, and give the Judges and Council Papers thereof, and keep an exact Account of all Cauſes depending, for which they have nothing.

So it is to be further conſidered, that ſuppoſe the Office of Clerk of the Papers was ſunk, whether there would not be Occaſion to erect a new Office in order to carry on the Buſineſs of the Court, *viz.* as to reading, ſetting down Cauſes, Trials at Bar, the Judge's Papers, and other Things relating to the Office, and what they now do; and further, whether it would be conſiſtent with the Dignity of the Court to diminiſh the Number of their Officers, eſpecially conſidering not only the Accidents of Health, *&c.* but that the Officers on the civil Side are already fewer in proportion than in any Court in *Weſtminſter-hall.*

It is further to be obſerved, that in filing the Rolls it is very troubleſome; firſt, none but a Clerk or an Attorney can; then you muſt go to the

* *By virtue of his Office.*

Maſter to pay for the Entry, to another to docquet them, and then to Mr. Tully to file them, and if you elapſe your Time, to pay 4 *s.* a Roll, which makes it abundantly more troubleſome than in the *C. P.* for there you pay the Prothonotary for the Entries, and leave your Rolls, and he takes care of them; and, if you elapſe a Term or two, nothing, or at moſt 1 *s.*

It is further to be obſerved, that the Fees in paſſing the Records are much increaſed, for that they are above double to what they are in *C. P.* and there is no certain Office yet ſettled to file Writs in.

And laſtly, it is to be obſerved, that there is much greater Encouragement given by the *C. P.* to Practiſers than in the *King's Bench*; for in the *C. P.* the Prothonotaries will admit any one as your Clerk *gratis*, and to practiſe as much as he will, whereas the ſame Indulgence is not allowed in the *King's Bench*; nay, here it is ſo ſtrict, that none but a ſworn Clerk or Attorney ſhall bring in a Roll, enter Satisfaction, and ſeveral other Matters, which forces the Practiſers at large to employ other People in their own Affairs; and really the Charge of being ſworn, and termly Payments are ſo very conſiderable, that it is no great Wonder that ſo many are deterred; and to conclude with a comical Obſervation of the *C. P's* Officers, "we are civilized and genteel People, and endeavour to court our Practiſers that practiſe with us, but you are moroſe and deter them from you," which may have no leſs Weight than Truth, for they having ſeveral Officers, are to make all the Intereſt they can for themſelves apart, whereas the Court of *King's Bench* having but ſingle Offices, can go no where elſe, and conſequently may make each apt to think they have the leſs Obligation to be ſo; but ſee now Stat. 2 *Geo.* 2. c. 23.

THE

THE

HISTORY and PRACTICE

OF THE

COURT of KING's BENCH.

RULES of the PRACTICE of the COURT OF KING's BENCH.

Concerning WRITS and their RETURNS.

The ſignable WRITS are:

THE *Latitat*,
Alias et plur. capias,
Exigent in Appeal,
Diſtring. in Attaint,
Habeas corpus,
Subpoena,
Certiorari,
Procedendo,
Elegit,
Superſedeas,
Retorn. habend.
Withernam,
Secunda deliberatio,
Reſtitution,
Scire facias,
Diminution,
Libello habend.
Venire fac. in Appeal,
Prohibition,
Conſultation,
Proprietate probanda,
Diſtring. ad deliband.
Rem. detent.
Inquir. et valore,
Re-attachment,
Venire fac. in audita querela,
Verſus partem,
Habere fac. poſſeſſion. et ſeiſinam.
Reſtitution in Attaint,
Venditione exponas.
Breve epiſcopo,
Re-ſummons,
Bre. et mandam. et Summons, *et diſtring.* on original Bills, againſt Perſons having Privilege of Parliament.

THAT

* THAT no Precept or Writ, with a Clauſe of *ac etiam billæ* be made or ſued forth againſt any Heir, Executor, or Adminiſtrator, nor in any Cauſe. whatſoever, where by the Courſe of the Court ſpecial Bail ought not to be required, nor upon any Bond or penal Bill, where the principal Money and Intereſt is not 10 *l.* but the Court, or any Judge of the Court may, and do notwithſtanding, on good Cauſe ſhewn, give Leave to the Plaintiff to ſue out a Writ with an *ac etiam*, to hold the Defendant to ſpecial Bail in an Action of Aſſault and Battery, or for Words, or *Scandalum Magnatum*, or any perſonal Wrong †.

The Form of the ſeveral AC ETIAMS are:

Debt. ‡ *Ac Etiam billæ ipſius querentis verſus ipſum def. pro.* 10 *l. de debito.*

Caſe. ‖ *Pro non performatione promiſſorum et aſſumptionum ad damnum ipſius querentis ad valorem,* 10 *l.*

Covenant. § *Pro fractione conventionum ad damnum ipſius querentis,* 10 *l.*

Pro

* 2 Brownl. 293. 3 Bulſtr. 316. *Rule*, 15 Car. 2. Cro. Jac. 352. Cro. Car. 59. Lit. Rep. 2, 3, 81. Sid. 62, 63. Lev. 145, 245, 268. 2 Lev. 204. 2 Jones, 82. Danv. Abr. 681, 682. Salk, 98. *See Stat.* 12 Geo. c. 29. *and* 5 Geo. 2. c. 27, *(both made perpetual by* 21 Geo. 2. cap. c. 3.) 2 Stra. 1157, 1209, 1219, 1226, 1270.

† Sid. 276, 307. Rol. Abr. 335. Lev. 39. Brownl. 90. Sid. 183. Raym. 74. Mod. Rep. 2, 16. Carth. 264. 2 Mod. Rep. 215. *Rule* Mich. Jerm. 1654.

‡ *And alſo to a Bill of the ſaid Plantiff, againſt the ſaid Defendant for* 10 *l. for Debt.*

‖ *For not performing Promiſes and Undertakings to the Damage of the ſaid Plaintiff, to the Value of* 10 *l.*

§ *For Breach of Covenants to the Damage of the ſaid Plaintiff of* 10 *l.*

* *Pro converſione et diſpoſitione bonorum et catallorum ipſius querentis ad valorem,* 10 *l.* Trover.

† *Pro captione et aſportatione bonorum et catallorum ipſius querentis ad valorem,* 10 *l.* Treſpaſs.

THE Latitat *al. et pluries capias* Bill of *Midd. diſtringas, habeas corpus*, and all other Proceſs thereupon muſt be returnable before and after Judgment, at Days certain, and may be returnable upon any Day in the Term, that is, *dies juridicus*; but if it be made returnable upon the *Eſſoin* Day of any Return the Day of the Week muſt be named in certain, as ‡ *Die Lunæ in menſem ſancti Michaelis*; and all other Days muſt be ſuch a Day, put ſuch a ‖ Return as § *Die Martis proxime poſt craſtinum ſancti Martini* of ¶ *Scire facias quare executio non et ad audiendum errores*, upon Writs of Error out of the *Common Pleas*, (unleſs the Suit be there by Bill) and in any inferior Court, Writs of *Capias ad ſatisfaciendum, fieri facias*, and other judicial Writs after Judgment affirmed, all Proceſs to the Outlawry, ** *Retorno habendo capias in Withernam*, and all other Writs and Proceſs grounded upon any *Recordari facias loquelam, audita querela, accedas ad curiam, capias ſi Laicus*, or any other original Writ out of the *Chancery*, muſt be made returnable †† *ubicunq*; on a certain Return, and not on a Day certain; and there muſt be fifteen Days ex-

* *For converting and diſpoſing of the Goods and Chattles of the ſaid Plaintiff, to the Value of* 10 *l.*

† *For taking and carrying away the Goods and Chattels of the ſaid Plaintiff to the Value of* 10 *l.*

‡ *On* Monday *in one Month of Saint* Michael.

§ *On* Tueſday *next after the Morrow of Saint* Martin.

‖ *This Return is taken away by* 24 Geo 2. c. 48.

¶ *Shewing Cauſe why Execution ſhould not iſſue, and to hear Errors.*

** *To have a Return, to take.* †† *Whereſoever.*

excluſive between the *Teſte*, and Return of all ſuch Writs, unleſs diſpenſed with by Act of Parliament; to which Purpoſe there are two, *viz.* 16 *Char.* Chap. 6. Sect. 7. whereby Proviſion is made, that all Writs and Proceſs in perſonal Actions having Day from *tres Michaelis*, till † *Craſtino animarum*, ſhall be good and effectual in Law, notwithſtanding there be not fifteen Days between the 4*to die* of *tres Michael.* and the Eſſoign Day of § *Craſtino animarum*; the other is, 13 *Char.* 2 St. 2. chap. 2. Sect. 7. by which Proviſion is made, that in all perſonal Actions, and all Actions *in ejectione firmæ* brought by Original, there ſhall not need to be fifteen Days between the *Teſte* and Return, of any Writ or Writs of *Venire facias habeas corpora juratorum*, or *diſtringas* as *Jurator fieri facias* or *capias ad ſatisfaciend.* and that the Want thereof ſhall not be Error, except the *Capias ad ſatisfaciendum*, whereon an Exigent after Judgment is to be awarded, or againſt the Defendant, to make Bail liable.

THERE is one Day in every *Michaelmas* Term, which cannot properly be ſaid to be in or paſt any Return, which is the 11th Day of *November*, being St. *Martin*'s Day; and if a Writ be made returnable on that Day, it muſt be made returnable ‡ *Die Lunæ in feſto Sancti Martini*, or any other Day in the Week; for betwixt § *Craſtino animar.* which is always 3d *Nov.* and ‖ *Craſtino Martini*, 12th *Nov.* for one Day of the Week fall out twice, ſo that if ‖ *Craſtino animarum* falls on *Friday*, the next Day is ¶ *Sabati poſt craſtinum*

* *This Return is taken away by* 24 Geo. 2. c. 48.
† *Three Weeks of St.* Michael, *till the Morrow of* All Souls.
‡ *On* Monday *of the Feaſt of* All Souls.
§ *The Morrow of* All Souls.
‖ *The Morrow of St.* Martin.

tinum animarum; and the next *Saturday* after will be * *Sabati in feſto Sancti Martini*, and ſo yearly according to the Day of the Week, in which the Feaſt of St. *Martin* happens.

The firſt and ſecond Days of *Nov.* being *All Saints*, and † *All Souls* in *Michaelmas* Term; the Feaſt of the Purification being the 2d Day of *Feb.* in *Hilary* Term, *Aſcenſion-day* in *Eaſter* Term, and the Feaſt of St. *John Baptiſt* being on *Midſummer-day*; if it falls in *Trinity* Term, are not *Dies juridici*, and Writs made returnable on any of theſe Days are not good.

In *Eaſter* Term, all the Eſſoin Days of every Return are *Sundays*, except the laſt, which is ‡ *Craſtino Aſcenſionis Domini*, and ſo are all the Eſſoyn Days of *Trinity* Term except the firſt, which is ‖ *Craſt. Trin.* ſo that every *Monday* in theſe Terms is paſt ſome Return or other, and the ſame Day of the Week on which *Eaſter* Term begins, is a ſure Day to make Writs returnable upon, thro' all the Returns of every Term except the laſt Return.

If any Defendant ſhall be legally delivered from any Arreſt upon Meſne Proceſs iſſuing out of this Court, the ſame Defendant ſhall not again be arreſted the ſame Term by virtue of any Proceſs at the ſame Plaintiff's Suit, or for the ſame Cauſe of Action, upon Pain, that every Attorney acting to the contrary, ſhall be put out of the Roll, and the Plaintiff and Attorney, ſhall be further puniſhed as the Court ſhall think fit. By Rule of *Michaelmas* Term, of 15 *Char.* Stra. 439. 2 Stra. 1039, 1209, 1216.

Con-

* Saturday *of the Feaſt of St.* Martin.

† *This Saint's Day does not now happen in* Michaelmas *Term, ſee* 24 Geo. 2. c. 48.

‡ *The Morrow of the* Aſcenſion *of our Lord.*

‖ *The Morrow of Trinity.*

Concerning the TERMS, their BEGINNINGS, &c.

To find out the Beginning and Ending of every Term in the Year, you muſt firſt know what Day of the Week *Michaelmas* Day happens on, and on that Day three Weeks after is the Eſſoyn Day of *Michaelmas* Term, and the 4*to die poſt.* incluſive, is the firſt Day of the Term, which is always 23d *October*, if it be not *Sunday*; but if *Sunday*, then the 24th, and endeth 28th *November*, if not *Sunday*, but if *Sunday*, then the 29th *.

Hilary Term begins 23d *January*, if not *Sunday*, and if *Sunday*, the next Day after, and is always that Day eight Weeks on which *Michaelmas* Term ended, and ends 12th *February*, if not *Sunday*, and if *Sunday*, then the 13th, and is the ſame Day of the Week on which *Michaelmas* Term begins.

Eaſter Term begins the *Wedneſday* Fortnight after *Eaſter* Day, and the Eſſoyn Day is the *Sunday* before, but held on *Monday*, and ends on the *Monday* before *Whitſunday*.

Trinity Term begins the *Friday* after *Trinity Sunday*, altho' that Day ſhould happen to be 24th *June*; for the Term muſt begin on *Friday* after *Corpus Chriſti* Day, and its Eſſoin Day is the *Monday* before, and ends the *Wedneſday* following after, unleſs it be 24th *June*; and then, on the Day after, and the Term muſt be adjourned on *Tueſday* to *Thurſday* following, which happens very rare †.

Farres 17.

Con-

* *This Term is now much altered, by* 24 Geo. 2. c. 48.

† *See* 32 Hen. 8. c. 21. Bro. *Abr. Tit. Adjournment. pl.* 35. *Cro.* Jam. 16. 595. Rol. Rep. 29. 7 Mod. 17. *See Lord* Raym. 1557, 1528, 2 Stra. 811. Barnard, K. B. 74. *In the Lawyer's Magazine for* Hilary Term 1761. *is a very learned and accurate Diſcourſe on the above Matters.*

Concerning HABEAS CORPUS and CERTIORARI.

THAT no Writ of *Habeas Corpus* directed any Sheriff, or any Officer of any inferior Court, for removing the Body of any Priſoner, other than *London* or *Middleſex*, and the *Marſhalſea*, or other Courts within five Miles of *London* ſhall be made returnable immediately, but at a Day certain in Court, unleſs it be to deliver over a Priſoner in diſcharge of his Bail; but ſuch Writ of *Habeas Corpus*, directed to the Sheriff of *London* and *Middleſex*, and the *Marſhalſea*, and other Courts within five Miles of *London*, may be granted in Vacation or Term-time returned immediately; and where ſuch *Habeas Corpus* is returned immediately, the Sheriff or other Officer ought to make his Return, and bring up the Body of the Priſoner immediately, as is required by the ſaid Writ, without permitting him to wander abroad by Colour or Pretence thereof, and where the Writ is made returnable at a Day certain in Court, the Priſoner is to be brought in Cuſtody according to the Writ, at the Day limited, without ſuffering the Priſoner to wander abroad in the mean time under pretence of ſuch Writ. *Praxis utriuſq; Banci* 1. Rule of *Michaelmas* Term 1654.

THAT no Writ of *Habeas Corpus* to remove a Cauſe out of any inferior Court, other than in *London*, *Middleſex*, or the *Marſhalſea*, or other Courts within five Miles of *London*, to be returned immediately, but at a Day certain in Court; and that every ſuch *Habeas Corpus* returnable in *Hilary* or *Trinity* Term, ought not to be made returnable after the ſecond Return of any of thoſe Terms; that in caſe Bail be put in thereon, the Plaintiff may declare before the End of the Term, and the Defendant ſhall plead to Iſſue as of thoſe Terms, ſo as the Plaintiff may try his Cauſe the next Same Rule.

next *Aſſizes* if he pleaſes, or in Default thereof, Judgment may be entered againſt the Defendant that Term by Default, if Rules to plead have been given.

THAT every ſuch *Habeas Corpus* ſued out in *Hilary* Term, or the Beginning of the Vacation following, and alſo in *Trinity* Term, or the Beginning of the Vacation following, ſhall be made returnable the 1ſt or 2d Return of the ſubſequent Terms, and not longer; and in caſe it be made returnable of a longer Return, any Judge of the Court may grant a *procedendo*, it tending to the Plaintiff's Delay.

Concerning HABEAS CORPORA & CERTIORARI.

THAT a *Habeas Corpus* * *ad reſpondendum* may be granted to the Warden of the *Fleet*, Sheriff of a County, or the Keeper of any inferior Priſon of any Liberty or Franchiſe, returnable at a Day certain in Court, and ſhall be as good Cauſe of Detainer as *Capias ad reſpondendum* directed to a Sheriff.

THAT a *Habeas Corpus ad ſatisfaciendum*, may be granted to the Warden of the *Fleet*, Sheriff of a County, or Keeper of any inferior Priſon, returnable in Court at a Day certain, and the Term and the Number of the Roll of the Judgment muſt be indorſed upon the Writ, by the Attorney who ſued it out, and ſuch Writ to be good Cauſe of Detainer, as a *Capias ad reſpondendum.*

THAT no *Certiorari* ought to be made to remove a Judgment out of any inferior Court, at the Proſecution of the Plaintiff in an Action, whereby to enable him to have Execution out of this Court to execute the Judgment of an inferior Court.

THAT

* *To anſwer.*

THAT upon a * *Habeas Corpus* or *Certiorari* ſued out and allowed, the Plaintiff may give a Rule for the *procedendo* in the Term-time, if the Bail be not put in, and in the Vacation Time, a Rule or Warrant for a *Procedendo* may be granted by any Judge of the Court, if deſired.

Concerning CAUSES removed out of CANTERBURY Court, and other Courts where Judges of Aſſize ſeldom come.

THAT upon a Cauſe removed by a * *Habeas Corpus* out of the Court of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, or *Poole*, which are Counties where Judges of Aſſize ſeldom come; if the Action be tranſitory, it ſhall be layed in the County where ſuch Cities or Towns lye.

No *Procedendo* after Bail filed above, becauſe that diſcharged the Bail below.

IF a Priſoner be returned, charged with Proceſs out of the Court of *Common Pleas* or *Exchequer*, returnable at a Day to come, yet he may be committed with theſe Cauſes, on the *Habeas Corpus cum cauſâ*. Syd. 313.

AND if upon an * *Habeas Corpus* or *Cepi Corpus* the Party be returned in Cuſtody, and bailable, where ſpecial Bail is required.

THE Bail is not to be taken abſolutely without the Conſent of the Plaintiff, or his Attorney; and if Bail be taken, † *De bene eſſe*, the Priſoner ought not to be diſcharged until the Bail is aſſented to, or the Plaintiff to be over-ruled in Court, to accept the ſame upon Examination.

THAT if a Priſoner be committed to the Cuſtody of the Marſhal on a * *Habeas Corpus*, and the Plaintiff do not declare againſt him, within two

* *Have the Body with the Cauſe.* † *Conditionally.*

Terms inclusive after his Commitment, the Prisoner, upon a Certificate that no Declaration is filed against him within that Time, shall be discharged upon common Bail.

That every Person committed to the Custody of the Marshal of the Court, by virtue of an *Habeas Corpus*, shall remain in the actual Custody of the Marshal, by the Space of two Days next after such his Commitment, notwithstanding any other *Habeas Corpus* from any other Court whatsoever.

That if a Defendant render himself in Discharge of his Bail after Judgment, yet, if he be not committed in Execution in two Terms following, he shall be discharged upon common Bail, as if he was committed for want of Bail upon an Action, unless a Writ of Error be depending.

Concerning Persons in Custody and their Discharge.

That if any Person be committed to the Prison of this Court, by Process of this Court in Term Time, and no Declaration be filed against him of that Term, or before the End of the next Term after, * *Sedente curiâ*; or if arrested, or in Custody, in any Action upon Process out of this Court, and be not removed before the End of the said Term inclusively, after such Arrest or Declaration delivered against him in Custody of the Sheriff, before the End of the second Term after he is arrested, such Person may be discharged upon common Bail.

No Writ to be taken out against a Prisoner in *Newgate*, without a Judge's Order.

Of

* *The sitting of the Court.*

Of Altering the Venue.

That in tranſitory Actions the Plaintiff, after the Eſſoyn Day of the ſubſequent Term, ſhall not alter his own *Venue*, tho' he would pay Coſts or give an Imparlance, Styl. Prac. Reg. 38, 533. See Stra. 211. 2 Stra. 858.

If the Defendant at any Time before Plea pleaded, makes affidavit, that the Cauſe of Action, if any, aroſe in the County of *A.* and not in the County of *B.* where the Action is brought he hath a Rule *niſi*, to the Change of the *Venue*; and then, if the Plaintiff will undertake to give Evidence of a Matter ariſing in *B.* the Cauſe is continued. See Rule of *Michaelmas* Term 1654. Salk. 668. 669. 2 Stra. 1162, 1202.

If it appear unlikely, that there can be a fair Trial in the County where a tranſitory Action is brought, the Court will change the *Venue*, and that tho' a Peer be Party. Ventr. 363, 364, 365.

The *Venue* can't be changed in an Action of Debt, for *Debitum et contractus ſunt nullius loci*, 1 *Syd.* 87. nor in * *Scandalum Magnatum* 185. nor in † Eſcape, or ‡ Deceit 87. *Keb.* 65. nor on Stat. of Uſury, 1 *Syd.* 287. 2 Stra. 776, 878. Fitzgib. 168. * Salk. 670. † Andr. 66.

If the Action be laid in one County, and on Defendant's Affidavit changed to another, the Plaintiff by his Affidavit may have it in a third, *Syd.* 442.

Concerning Bail, Appearances, Declarations and Pleas.

If the Plaintiff in the Action ſues the Bail-Bond, he can't refuſe the ſame Perſons to be Bail Salk. 97.

* Lev. 56. Vent. 363, 364, 365. 2 Mod. 215. *Sir* Thomas Jones (*Sheriff*) 192. Carth. 400. Skin 40. Salk. 668. 2 Lord *Raym.* 1418. Andr. 198. 2 Stra. 807.

to the original Action; but if the Plaintiff proceeds againſt the Sheriff by Amerciament, he is not obliged to accept the Bail to the Sheriff, upon Removal of a Cauſe by *Habeas Corpus* out of an inferior Court, the Bail there may be Bail above, becauſe the Plaintiff might have excepted to them below; but it is otherwiſe where a Cauſe comes out of *London*, for there the Officer is anſwerable, and the Plaintiff cannot except againſt the Bail he takes.

That every Attorney who ſhall appear for any Defendant in any Action, in which ſpecial Bail is not required, ſhall duly file common Bail for ſuch Defendant, of the Term of which he appears, and give Notice thereof to the Plaintiff or his Attorney, and that where ſpecial Bail is required, and put in *de bene eſſe*, before any Judge or Commiſſioner, on a *Cepi corpus*, the Defendant's Attorney ſhall forthwith give Notice thereof in Writing to the Plaintiff or his Attorney, and of the Names of ſuch Bail, with their Additions and Places of Habitation; and if no Exception be taken to ſuch Bail, and entered in the Judges Book within twenty Days after ſuch Notice, then upon Oath thereof made, for which no Fee is to be taken, ſuch Bail ſhall be filed; and if ſpecial Bail ſhall be put in before any Judge of this Court, *de bene eſſe*, or on any Writ of *Habeas Corpus*, or *Certiorari*, and no Rule for better Bail, or Exception taken or entered in the Judges Book againſt the Bail, ſo put in within twenty-eight Days after putting in ſuch Bail, that then ſuch Bail ſhall be filed by the Defendant's Attorney, after the End of the ſaid twenty-eight Days *.

The

* *Rule of* Michaelmas *Term*, 16 *Char.* 2.

THE Plaintiff hath twenty Days to except againſt Bail on a Writ of Error, and need not give Notice; but he cannot take out Execution without ſerving the Plaintiff in Error with a four Days Rule, to put in better Bail. Sect. 98.

ON Motion the Court will order an *Ac etiam*, where the Treſpaſs or Aſſault was great, and in what Sum Bail ſhall be given.

THAT every Bail taken before or upon the Continuance-day ſhall be a Bail, and filed of the preceding Term; and every Bail taken after the Continuance-day, ſhall be a Bail, and filed of the ſubſequent Term, and no otherwiſe; but where any new Bail is added to any other Bail ſo as aforeſaid taken on or before the Continuance-day, the ſame ſhall be taken as filed, as of that Term in which the Bail was firſt put in.

THAT no perſon being Bail in Court, or before a Judge upon an *Habeas corpus*, or *Cepi corpus*, ſhall upon a Recovery againſt the Defendant, be anſwerable for any greater Sum or Sums than are mentioned, in the Writ on which ſuch Defendant was arreſted, or in the Return of the *Habeas Corpus*, but ſhall be liable for ſuch, or any leſs Sum recovered againſt the Defendant. Salk. 102. 6 Mod. 90, 266, 267. Holt 89. 3 Keb. 16. 2 Stow 183. 2 Stra. 922. Rule of *Eaſter* Term, 5 Geo. 2. Rule of *Hillary* Term, 2 Jam. 2.

THAT in all Cauſes removed out of any inferior Court, either by *Habeas corpus*, Writ of Privilege, or *Certiorari*, ſpecial Bail is required, unleſs the Defendant be ſued as Executor, Adminiſtrator, or Heir, and then common Bail is only required.

THAT no Attorney of this Court, or any other Perſons, ſhall be compelled to appear, or file or cauſe to be filed, common Bail for any Defendant in this Court, unleſs ſuch Attorney, or other Perſon hath, by a Note in Writing under his Hand, undertaken ſo to do, and ſuch Note produced

duced by the Plaintiff's Attorney; but if any Attorney of either Court, or any other Person practising as such, hath accepted a Warrant to appear for the Defendant, which Warrant shall in no wise be revoked, or hath subscribed the same, and do not cause Bail to be filed accordingly, such Attorney, or other Person, shall be compelled to file a common Bail of the proper Term, and take a Declaration and plead to the same, or in Default of Pleading, Judgment may be entered by Default, if Rules for Pleading have been given, for that the Default of the Defendant or his Attorney, shall not tend to the Plaintiff's Prejudice.

See Styl. 3, 9. 47.

THAT any Person whatsoever may deliver or file a Declaration by the bye against the Defendant arrested at another Man's Suit any time, *sedente curiâ*, in the Term wherein the Writ on which such Defendant was arrested was returnable, but not afterwards.

See Rule of Trin. Term, 12 Wil. 3 Trin. 11 Geo. and 2 Geo. 2. and 2 Ld. Raym. 1407.

THE Plaintiff's Attorney is not bound to deliver to the Defendant's Attorney the Declaration itself, but instead thereof a true Copy of it upon Stampt-paper; and the Defendant's Attorney shall pay the Plaintiff's Attorney upon Delivery of such Copy, after the Rate of 4 *d. per* Sheet, computing seventy-two Words for each Sheet, besides the Duty; and that upon giving any general Issue or Demurrer, to any Declaration, before any special Demurrer, or special Plea pleaded, the Plaintiff's Attorney shall deliver to the Defendant's Attorney a Copy of such Issue or Demurrer, and that the Defendant's Attorney shall pay for the same, besides the King's Duty, after the Rate of 4 *d. per* Sheet, computing seventy-two Words for each Sheet; and in case the Defendant's Attorney shall refuse to pay for the Copy of the Declaration so tendered to him, the Plaintiff's Attorney may leave the said Copy in the Office with the

the Clerk that keeps the File of Declarations, to whom the Defendant's Attorney ſhall pay for the ſame as aforeſaid, before the ſame ſhall be delivered to him; and in caſe the Defendant's Attorney ſhall not pay for the Copy of any general Iſſue, ſo as aforeſaid joined, or any general Demurrer, upon the Tender of the ſame, the Plaintiff's Attorney may ſign Judgment, as if no Plea had been pleaded; and in Default of paying for ſuch Copy of the Declaration ſo as aforeſaid, tendered or left in the Office, the Plaintiff may notwithſtanding proceed to give Rules, and when the Rules are out, Judgment may be entered, and no Plea to be received till the Copy of the Declaration be paid for as aforeſaid.

If the general Iſſue be pleaded after * *Reſpond. ouſter*, the Defendant is to pay only for a Copy of the Declaration and Iſſue, and not for the former Proceeding in Abatement. Salk. 5. Mod. Caſ. 51.

That if any Perſon be arreſted by Meſne-proceſs out of this Court, returnable the firſt Return of *Eaſter* or *Michaelmas* Terms, and the Defendant appears on the *Cepi corpus*, if the Declaration be laid in *London* or *Middleſex*, and delivered before the Eſſoyn-day of † *Menſe Paſchæ* in *Eaſter* Term, or the Eſſoyn of ‡ *Craſtino Animarum* in *Michaelmas* Term, the Defendant is to plead to enter four Days before the Eſſoyn-day of the next Term, if Rules have been given, ſo as the Plaintiff may, if he pleaſes, enter ſuch Plea; but if the Declaration be delivered after † *Menſe Paſchæ* in *Eaſter* Term, or ‡ *Craſtino Animarum* in *Michaelmas* Term, or at any other Time, in any of the two Terms, the Defendant

* *An anſwer over.* † *One Month of* Eaſter.
‡ *The Morrow of* All Souls.

is to imparle till the next Term, after ſuch Declaration delivered.

THAT in Cauſes removed by *Habeas corpus* or *Certiorari*, out of *London*, *Middleſex*, the *Marſhallſea*, or other Courts within five Miles of *London* or *Middleſex*, and Bail put in thereon, if the Plaintiff or Plaintiffs mentioned in ſuch Return of ſuch *Habeas corpus*, do not deliver his or their Declaration or Declarations thereon, ſix Days before the End of the Term of which the Bail is put in, if the Action be laid in *London* or *Middleſex*, the Defendant is to imparle till the next Term; but if it be delivered before that Time, if it be in *Hilary* or *Trinity* Terms, then the Defendant is to plead to enter four Days before the Eſſoyn-day of the ſubſequent Terms, ſo as the Plaintiff may enter his Iſſue if he pleaſes; and in *Michaelmas* and *Eaſter* Terms, if the Declaration be delivered before the Eſſoyn-days of * *Craſtino Animarum* of *Michaelmas* Term, or † *Menſe Paſchæ* in *Eaſter* Term.

THE Defendant is to plead to Trial the ſame Term; but if the Defendant will plead in Abatement, ſuch Plea muſt be pleaded before the Rules of pleading are out.

Mod. 14. Stra. 523, 532. 2 Stra. 1192. Caſ. Temp. Holt 524.

THAT any Plea to the Juriſdiction of the Court cannot be pleaded after an Imparlance, nor any Plea in Abatement, without a ſpecial Imparlance, which muſt be granted by the Court; but if the Plaintiff does not deliver his Declaration four Days at the leaſt before the End of the Term, the Defendant may, within the firſt four Days, excluſive of the ſubſequent Term, plead any Plea in Abatement, or to the Juriſdiction of the Court, as of the preceding Term; and if ſuch Plea be not delivered or brought into the Office before the

* *The Morrow of* All Souls. † *One Month of* Eaſter.

the Expiration of the ſaid four Days, ſuch Plea ſhall not be received.

THAT no dilatory Plea ſhall be received, unleſs the Party offering ſuch Plea do, by Affidavit, prove the Truth thereof, or ſhew ſome probable Matter to the Court to induce them to believe, that ſuch Fact of ſuch dilatory Plea is true. and 5 Annæ, c. 16, Sect. 11. Stra. 639. 2. Stra. 738. 1116, 2. Lord Raym. 1409.

THAT if any Perſon be arreſted, by Proceſs out of this Court, and do by his Attorney appear, and file Bail of the Term wherein the Writ is returnable, and the Plaintiff does not declare before the End of the Term next following after the Arreſt, a *Non proſs* may be entered, and the Defendant ſhall have Coſts, to be taxed in ſuch Manner as is uſual.

THAT the Plaintiff may amend his Declaration in matter of Form, after a general Iſſue pleaded before Entry, without paying Coſts, or giving Imparlance; but if in ſubſtance to pay Coſts, or give Imparlance at his Election; but if he amends Subſtance, after a ſpecial Plea pleaded, to pay Coſts, tho' he would give Imparlance, See Fitzgib. 193, 2 Stra. 890. Barnard. K. B. 408.

THAT the Plaintiff may amend his Bill upon File, at any Time before Plea pleaded, but not afterwards, without Motion.

THAT a Plaintiff, after Plea pleaded, or after the ſecond Term, ſhall not add a new Count to his Declaration, as an * *Indebitat aſſumſit*, or the like, upon Pretence of amending his Declaration.

WHERE a Perſon is in Cuſtody of the Marſhal, and a Bill is filed againſt him, which muſt be done *Sedente curiâ*, if a Copy thereof be not delivered to the Turnkey or the Priſoner himſelf, the Plaintiff cannot proceed to Judgment; and if the Bill be filed four Days before the End of the

* *Being indebted, promiſed.*

the Term, the Defendant is to plead as of that Term, Rules being given; but if the Declaration be not filed four Days before the End of the Term, the Defendant is to have an Imparlance.

2 Show, Comb 465. Salk. 544. 12 Mod. 163.

WHERE a Bill is filed againſt an Attorney, which muſt likewiſe be done in Term-time. *Sedente curiâ*, the Plaintiff cannot proceed to Judgment againſt him till he has delivered a Copy of the Bill to the Attorney himſelf, or ſome other Perſon acting for him; and if the Bill be filed four Days before the End of the Term, the Defendant is to plead as of that Term, Rules being given; but if filed after that Time, the Defendant is to have an Imparlance.

THAT where an Attorney is Plaintiff, he ſhall have the ſame Remedy againſt the Defendant as the Defendant has againſt him, *viz.* to make him plead without an Imparlance, and ſhall hold the Defendant to ſpecial Bail in any Action for his Fees, although his Demands be under 10 *l.* * but in any other Action, he cannot but as a common Perſon, and his Writ muſt be made ſpecial with an *ac etiam* Bill for 10 *l.* or upwards.

THAT a Plaintiff cannot diſcontinue his Action after a Demurrer joined and entered, or after a general or ſpecial Verdict found, or after a Writ of Enquiry executed, without Leave of the Court.

THAT if an Infant declare by Guardian, or *Prochein amy*, the Defendant is not compellable to plead until the Plaintiff ſhews a Rule of Court for his Admittance.

THAT if an Infant be ſued, he cannot regularly appear or plead by his Guardian without Admittance; but if he do plead *per Guard.* tho' not

* *See* 12 Geo. *chap.* 29. *made perpetual by* 21 Geo. 2. *chap.* 3.

not admitted, 'tis only a Misdemeanor in the Attorney, for which the Court may punish him if they please, but no Error.

That a Defendant having pleaded to Issue, and the Plaintiff neglects to enter the Issue the same Term the Issue is joined, the Defendant within the first five Days of the next Term, may alter his Plea, and plead *De novo*, any other Plea that he pleases; that if the Defendant has pleaded one Outlawry in Disability of the Plaintiff, and that be reversed, he shall not plead another in Disability; but *quære* whether he may not plead another in Bar.

That if a Defendant appear and imparle, till the first Day of the next Term, and die after the Day in Bank; yet if Rules be given for Answer, and no Plea be pleaded, Judgment may be entered against him next Term by *Nihil dicit*, as of the first Day of the Term.

That where any Person or Persons shall plead any Judgment or Judgment, or any other Matter of Record in the same Court, the Party so Pleading shall, upon Demand, give the Attorney on the other Side a Note in Writing of the Term and Roll where such Judgment or Record is entered or filed, and in Default thereof such Plea is not to be received.

That if the Plaintiff or Defendant, in any Declaration or Plea, shall make a *profert in curiâ*, of any Deed or other Writing, either Party may pray *oyer* of such Deed or other Writing, and must have a Copy thereof delivered to him, paying for the same after the Rate of 4 *d. per* Sheet, besides the Duty, and shall have four Days time exclusive, after such Deed or Writing produced, and Copy thereof delivered, if demanded in time, to plead Reply, *&c.* as Occasion requires.

That

THAT if a Writ be ſued out againſt Huſband, and Wife only arreſted and detained in Priſon, ſhe ſhall file a common Bail, and have a *Superſedeas* to diſcharge her; but if the Huſband be only arreſted, he muſt appear for himſelf and Wife.

THAT in tranſitory Actions, the Plaintiff after Eſſoyn-day of the ſubſequent Term after his Appearance, ſhall not alter his *Venue* or Iſſue, though he would pay Coſts and give Imparlance.

Of DECLARATIONS to be delivered to PRISONERS in COUNTY-GOALS, *&c.*

Rule of *Eaſter* Term, 5 *Wil.* and *Mar.*

THAT no Copy of a Declaration be delivered to a Priſoner in Cuſtody of a Sheriff, or inferior Goal-keeper, before the Day of the Return of the Proceſs, upon which the Defendant was taken or charg'd in Cuſtody.

THAT no Rule be given for the Defendant in Cuſtody, to appear and plead to any Declaration againſt him, till an Affidavit be filed with the Clerk of the Rules, of the Delivery of a Copy of ſuch Declaration, and the Time when, and the Perſon to whom the ſaid Copy was delivered, and that the Defendant was arreſted or charged in Cuſtody by Proceſs of this Court, returnable before the Delivery of ſuch Copy, and that the Time when ſuch Affidavit was filed, be entered upon the ſaid Affidavit by the Clerk of the Rules, and Copy of ſuch Affidavit be produced to the Secondary before ſigning of Judgment.

THAT upon every arreſt by Meſne Proceſs out of this Court, returnable the firſt Day of *Eaſter* or *Michaelmas* Term, if a Copy of the ſaid Declaration be delivered againſt ſuch Defendant,

dant, before * *Menſe Paſchæ* in *Eaſter* Term, or † *Craſtino Animarum* in *Michaelmas* Term, and Affidavit thereof be made and filed; and the Defendant does not appear before the End of ten Days after *Eaſter* and *Michaelmas* Term reſpectively, Judgment may be entered againſt him if Rules have been given; but if he doth appear before the Expiration of ten Days after the Term, he ſhall imparle until the next Term, unleſs the Arreſt be in *London* or *Middleſex*, and the Action there laid, then, though he does appear before the Expiration of ten Days after the End of the Term, he ſhall plead two Days before the Eſſoyn-day of the next Term, and in Default thereof, Rules having been given, Judgment may be entered againſt him as aforeſaid; but if a Copy of the Declaration be delivered againſt ſuch a Defendant, on or after * *Menſe Paſchæ* in *Eaſter* Term, or † *Craſtino Animarum* in *Michaelmas* Term, or in or after *Hilary* or *Trinity* Term; if the Defendant appear to ſuch Declaration any Time before the Eſſoyn-day of the Term next after Delivery of the Declaration, he ſhall imparle until the ſaid next Term; but if he does not appear within that Time, or if he appear, and does not plead to the Declaration ſo delivered, in the next Term Judgment may be entered againſt him by Default, Rules for Pleading having been firſt given.

THAT if a Writ be returnable in any Term, and Copy of Declaration hath been delivered before the Eſſoyn-day of the next Term, the Plaintiff in ſuch next Term, may give Rules to appear and anſwer; if the Defendant does not appear and plead in due time, Judgment may be entered againſt him.

IF

* *One Month of* Eaſter. † *The Morrow of* All Souls.

If any Declaration be not filed before the End of the next Term, after the Writ or Proceſs by which the Priſoner was charged or taken into Cuſtody is returnable, and Affidavit made and filed in Manner aforeſaid, before the End of twenty Days next after ſuch Term, the Priſoner ſhall be diſcharged by common Bail, ſigned by one of the Juſtices of the Court.

If any Goaler or Keeper of a Priſon have received a Copy of any Declaration againſt any Priſoner in his Cuſtody, ſhall ſuppreſs the ſame, and not deliver it forthwith to ſuch Priſoner an Attachment ſhall be iſſued againſt him.

Of Wagers in Law.

When the Iſſue of *Nihil debet per legem* is entered upon the Roll, the Secondary muſt appoint a Day for the Defendant to appear in Court, to wage his Law; and if he appears, he muſt bring his Compurgators with him, ſo many as the Court ſhall think fit to appoint, who are to ſwear that they believe he ſwears true; the Secondary muſt have the Record in Court, and the Defendant muſt ſtand at the End of the Bar, towards the Right-hand of the Chief Juſtice, then the Secondary muſt aſk him whether he will wage his Law; if he anſwers that he will, the Judges uſually admoniſh him to be well adviſed, and tells him the Danger of a falſe Oath; but if he will perſiſt, then the Secondary ſpeaks theſe Words following, *A. B.* the Defendant, you owe *C. D.* the Plaintiff 40*s.* as the Caſe is; *Q.* Why you don't pay him? *A.* I owe him nothing. *Q.* Did you not buy, *&c.* as in the Declaration? *A.* No. *Q.* will you take your Oath of it? Anſwer, I will. Then the Secondary muſt bid the Cryer call

the Plaintiff, bidding the Defendant to lay his Hand on the Book, and ſay after him, *viz.* this hear the Juſtices, that I owe not *C. D.* 40 *s.* nor any Penny thereof, in Manner and Form as he has declared againſt me, ſo help me God, and by the Contents of this Book.

If it be an Action of Account, the Words muſt be, that I never was Bailiff to *C. D.* of the Goods, Wares, and Merchandizes of the ſaid *C. D.* nor of any Part or Parcel thereof in Manner and Form as the ſaid *C. D.* hath declared againſt me; but before he takes the Oath, the Plaintiff is called thrice by the Cryer, if he does not appear he becomes non-ſuited, and the Defendant goes quit without taking his Oath.

But if the Plaintiff appears, and the Defendant performs his Law, and the Compurgators give their Verdict, that they believe that he ſwears true, the Plaintiff is for ever barred.

That the Defendant cannot be admitted to wage his Law-ſuit inſtantly after Imparlance, but he may before, and then the Plaintiff cannot be non-ſuited, if the Defendant perfect his Law; but if he wage his Law, after Imparlance, the Plaintiff may be non-ſuited.

Of Trials by Proviso, and otherwiſe, and giving Rules to enter Issues.

That no Trial can be had by Proviſo in Cauſes in *London* or *Middleſex*, till the Plaintiff hath made Default after the Iſſue is entered on Record, nor in Country Cauſes, till the Plaintiff hath made Default in trying his Cauſe the next *Aſſizes*, after Iſſue entered on Record.

That

THAT both Plaintiff and Defendant may carry down the Record at the ſame time, but the Cauſe muſt be tried on the Plaintiff's Record, if he enter it with the Marſhal; but if he refuſes or omit to enter it with the Marſhal, the Defendant may try it on his Record; but ſee now 14 *Geo.* 2. Chap. 17.

THAT if Notice of Trial be given for a Day certain in *London* or *Middleſex*, and the Cauſe not tried that Sitting, or if the Plaintiff be hindered from trying it by the Defendants entering a *Ne recipiatur*, yet the Plaintiff, in either Caſe, may try it next Sitting, upon Notice given to the Defendant or his Attorney, before or on the Day of the firſt Sitting, before the Riſing of the Court; but if the Cauſe be not tried the next Riſing, unleſs made a *Remanet*, then Notice to be given as at the Firſt.

THAT fourteen Days Notice of Trial, or of executing Writs of Enquiry, ſhall be given in all Cauſes in *London* and *Middleſex*, when the Defendant lives diſtant * forty Miles from *London* or *Middleſex*; but in all other Cauſes for Trials of Writs of Enquiry in Country Cauſes, and eight Days Notice incluſive ſhall be ſufficient, and that *Sunday* ſhall be accounted for one of the Days, that every Notice of Trial, or of executing Writs of Enquiry; and all Countermands of the ſame ought to be given in Writing.

THAT if a Cauſe have continued four Terms without Proſecution, before Iſſue joined, the Defendant is to have a whole Term's Notice to plead, rejoin, *&c.* before Judgment can be entered againſt him; and if after Iſſue joined, a whole Term's Notice before the Trial; (but the com-

* *Computed not Poſt Miles*, 2 *Str.* 954, 1216. 2 *Barnard*, *K. B.* 33.

common Notice will do if the Cauſe was hung up by Injunction or Privilege; (*Sid.* 92.) and likewiſe the Plaintiff muſt have the ſame Time to reply or ſurrejoin, and for Notice of Tryal by Proviſo, or any other Proceeding.

Michaelmas Term, *Anno 2do Annæ Reginæ*, it was agreed, * *Per totam curiam*, that Notice within the fourth Term after Declaration delivered, Plea pleaded, or Iſſue joined, is good Notice, but not after, unleſs ſome Proceeding have been actually made in the ſame Term, as the giving a Rule, or ſuing out the *Ventre*, *&c.* and then Notice after the fourth Term is good. Note: 1

Michaelmas Term, *Anno decimo Annæ*, in the Cauſes of † *Harvey* and *Wright*, and *Uxor*, where Iſſue had been joined above four Terms, and Plaintiff's Attorney, the laſt Day of *Hilary* Term, had given Notice of Trial for the next *Aſſizes*, and Cauſe tried accordingly, it was ruled by the Court to be no good Notice, but he ought to have given a whole Term's Notice (that is to ſay) before the Term begins; ſo is the Practice in the other Courts. Note.

THAT in Actions in *London* or *Middleſex*, the Defendant ought not to give the Plaintiff a Rule to enter his Iſſue the ſame Term Iſſue is joined, unleſs the Plaintiff has firſt given the Defendant Notice of a Trial that Term; and likewiſe in Country Cauſes, the Defendant ſhall not give the Plaintiff a Rule to enter his Iſſue the ſame Term Iſſue is joined.

THAT if the Defendant gives a Rule for the Plaintiff to enter his Iſſue, the Action lying in *London* or *Middleſex*, the Plaintiff muſt enter the ſame, and bring in the Record into the Office within four Days after Notice of the Rule; and

* *By the whole Court.* † 10 *Mod.* 40.

if the Action lie in the Country, he muſt bring it in before the Continuance-day of the Term, or in a Default thereof, a Non-ſuit may be ſigned and entered.

THAT on all ſpecial Rules given with the Secondary to plead in bar, reply, rejoin, ſurrejoin, rebut, &c. each Party ſhall have a Copy of the ſaid Rule given him, and ſhall have four Days time excluſive after Notice, and Copy of the ſaid Rule given to plead in bar, reply, *&c.* and if Judgment be ſigned within that Time, the ſame ſhall be ſet aſide, and that *Sundays* and Holidays (if Days in Court) ſhall be reckoned as Days within thoſe Rules.

THAT where a Plaintiff demurs to, or takes Iſſue on the Defendant's Plea, Rejoinder, or any other Pleading, and that he will not make up the Book, and enter the ſame on Record, the Defendant may make up the Paper-book with the Clerk of the Papers, and enter the ſame on Record if he pleaſes, on a Rule given by the Secondary for that Purpoſe.

Of WRITS of ERROR, and PROCEEDINGS thereon.

THAT the Plaintiff in the Action, as ſoon as the Tranſcript of the Writ of Error is brought into the Office, and entered in the Officer's Book kept for that Purpoſe, may make out a *Scire facias quare executionem non*; *teſte*, the laſt Day of the Term precedent, if it be before Eſſoyn day of the ſubſequent Term, or if brought in the Term-time, the Writ of the *Scire facias* may be made out, and bear *teſte* the firſt Day of the Term; that the Plaintiff in Error ought to enter the Tranſcript on Record of the ſame Term it is brought into the Office; and if he neglect to

to do it, the Defendant in Error may enter it, becauſe they are both as it were Plaintiffs.

THAT the Attorney who firſt takes the Tranſcript out of the Office, ought to keep it no longer than he can make a Copy of it, and then to bring it back again, and get his Name diſcharged in the Book, ſo that the Attorney of the other Side may likewiſe take it out, and be enabled to make a Copy thereof.

THAT if the Plaintiff in Error doth not aſſign his Errors, and give a Copy of them to the Defendant's Attorney in Error, by or before the Time given by the Rule on the *Scire facias*, and take out Execution thereon, but can have no Coſts, unleſs he give a Rule for the Plaintiff to aſſign Error on Record, which, if he doth not do, he may be non-proſs'd, and the Defendant in Error ſhall have his Coſts.

THAT if the Plaintiff in Error alledge Diminution, that there is no Original or no Warrant of an Attorney, or any other Matter, and prays a *Certiorari*, the Defendant in Error muſt give a Rule to return the *Certiorari*; and if it be not returned by the Time in the Rule, the Defendant in Error muſt join in a *Nullo eſt erratum*, and take no Notice of the Diminution, but enter on the Record a *non miſit breve*; and if a *Certiorari* be prayed of a wrong Term, and Chief Juſtice or *Cuſtos brevium* return on it, that there is no Original or Warrant of Attorney of that Term, the Defendant in Error may make a Suggeſtion of the right Term, and pray a *Certiorari*, which, when it is returned, he may join in * *Nullo eſt erratum*, which the Defendant in Error, may enter himſelf, paying the Plaintiff's Attorney for the ſame.

* *No Error.*

THAT when the Plaintiff in Error hath assign'd the general Errors, he must give a Copy of them to Defendant's Attorney, who may plead in * *Nullo est erratum* immediately, and enter both on the Roll, paying the Plaintiff's Attorney 2 *s.* 4 *d.* for the same.

THAT every Attorney who shall sue out any Writ of Error in any Judgment in this Court, returnable in the *Exchequer* Chamber, shall forthwith allow such Writ of Error, with the Clerk of the Errors of this Court for the Time being, and in case where special Bail shall be required. If the Plaintiff upon such Writ of Error, do not, within four Days after Allowance thereof, put in special Bail thereon, the Plaintiff in the Action may proceed to take out Execution notwithstanding such Writ of Error; and where special Bail is put in, the Plaintiff or his Attorney must forthwith give Notice thereof to the Defendant in Error, or his Attorney; and if the Defendant do not except against such Bail, within twenty Days after such Notice given, such Bail shall be allowed.

By Rule of *Easter* Term, 16 and 36 Char. 2.

THAT if the Plaintiff in Error, after the Errors are assigned in the *Exchequer* Chamber, intends to argue the same, he must give ten Days Notice thereof to the Clerk of the Errors in the same Court, before they shall be argued by the Council on either Side; and the Attorney for the Plaintiff in Error shall deliver four Copies of the Books to the Justices of the *Common Pleas*, and the Attorney of the Defendant shall deliver four Copies to the Barons of the *Exchequer*, four Days before the Hearing of the Cause; but in case the Errors are not argued, then no Copies are to be delivered.

Rule of *Easter* Term, 33 Char. 2.

Of

* *In no Error.*

Of PROCESS againſt BAIL, and other PERSONS by SCIRE FACIAS, and when BAIL is diſcharged.

* THAT every *Cap. ad ſatisfaciendum*, to warrant *Scire facias* againſt Bail, muſt have eight Days at the leaſt, excluſive betwixt the *Teſte* and the Return thereof, and ſuch *Cap. ad ſatisfaciendum* ought to be delivered, and left with the Sheriff to whom it is directed, four Days excluſive at the leaſt before the Return †.

THAT if a Defendant give Judgment with ſtay of Execution, until a certain Day, the Plaintiff may, notwithſtanding ſuch ſtay of Execution, ſue forth a *Cap. ad ſatisfaciendum*, or *Fieri facias*, directed to the Sheriff of the County where the Action is laid, and returnable before the Day to make out a *Teſtatum* againſt the Defendant; but no ſuch *Cap. ad ſatisfaciendum* ſhall be ſued forth to warrant a *Scire facias* againſt the Bail, unleſs by ſpecial Agreement, becauſe it is to the Prejudice of a third Perſon.

THAT if a Defendant die before the Return of a *Cap. ad ſatisfaciendum* againſt him, his Bail pleading the ſame may be diſcharged.

THAT if a Defendant be rendered to the Cuſtody of the Marſhal, in diſcharge of his Bail, at any Time before or on the Day of the Return of the ſecond *Scire facias* againſt the Bail, where two *Nihils* are returned on or before the Day of the Return of the firſt *Scire facias*, where a *Scire* Sir Wm. Jones, 136.

* *Salk.* 602. *Prax. utr. Banc.* 27.
† *Salk.* 599. 2 *Lord Raym.* 1177.
‡ *Sitting the Court.*

facias is returned * *Sedente curiâ*; or if an Action of Debt be brought on the Recognizance, if the Defendant be rendered to the Cuſtody of the Marſhal, within eight Days in full Term after the Day of the Return of the Proceſs againſt the Bail, they ſhall be diſcharged; and if upon ſuch Render the Bail-piece ſhall be diſcharged by the Secondary, and Notice of ſuch Render given to the Plaintiff or his Attorney, no *Scire facias*, or any other Proceſs, ought afterwards to be ſued out upon that Recognizance.

THAT if any Judgment be affirmed upon a Writ of Error in the *Exchequer* Chamber, no Execution ſhall go againſt the Bail in the original Action for the Coſt taxed * *Occaſione dilationis executionis.*

THAT upon a Render of a Perſon in diſcharge of his Bail, the Defendant's Attorney muſt give Notice thereof in Writing to the Plaintiff or his Attorney, and make Oath thereof before the Bail-piece ſhall be delivered to him, unleſs filed before; and alſo ſhall enter the ſame in the Marſhal's Book kept in the Office.

THAT if a *Scire facias* be brought againſt Bail, upon a Recognizance on a Writ of Error, generally, without expreſſing the Action, or the Condition of the Recognizance, there the *Scire facias* againſt them muſt be returnable on a general Return, *ubicunq*; *&c.* and muſt have fifteen Days excluſive, between the *Teſte* and the Return thereof; but if the Action and Condition of the Recognizance be ſet forth on the *Scire facias*, and it appears to be by Bill upon the *Scire facias*, then the *Scire facias* to be made returnable at a certain Day in Court.

THAT

* *By Occaſion of the Delay of the Execution.*
† *By Rule of Trin. Term,* 1 *An.*

THAT in all *Scire facias*, when the Suit is by Bill, there need no more than fifteen Days, excluſive betwixt the *Teſte* of firſt *Scire facias*, and the Return of the 2d, and each Writ to have 8 Days betwixt the *Teſte* and Return, and not four or five Days, and the other ten or eleven Days; but if the Suit be by Original, there muſt be fifteen Days excluſive, betwixt the *Teſte* and Return of each *Scire facias*, and the firſt Writ is to be delivered to the Sheriff ſome time before the Return is out, and before the ſecond *Scire facias* is ſued out, and the ſecond to bear *Teſte* on the Day of the Return of the firſt, and to be delivered to the Sheriff four Days at the leaſt before the Return is out, and the Sheriff to endorſe on each Writ the Day of the Month on which he received the ſame.

THAT all Writs of *Scire facias* muſt be entered on Record, the ſame Term the firſt *Scire facias* is returnable.

THAT where a Judgment is revived by *Scire facias*, the Plaintiff may at any Time within a Year after, ſue forth an Execution thereon, and continue the ſame on the Roll on which the *Scire facias* is entered; but if he doth not take out Execution thereon within a Year, the Judgment muſt be revived again by *Scire facias* as at the firſt.

THAT upon a Judgment obtained, all Parties thereto living, an *Elegit* to be taken out within the Year, and awarded upon the Roll, the ſame may be continued down from Term to Term to the Time of the Execution thereof, altho' after the Year, and ſhall be as good as if the Judgment had been revived by *Scire facias*, for that the Sheriff upon the *Eligit*, may deliver the Poſſeſſion to the Plaintiff, ſo far as to enable him to bring his Writ of *Ejectment* or *Aſſize*.

Of BAIL-BONDS, WARRANTS of ATTORNEY for entering of JUDGMENTS, ſigning and entering other ISSUES and BONDS.

Rule of *Eaſter* Term, 15 Char. 2. 2 Stra. 902.

THAT a Warrant for confeſſing Judgment taken by any Sheriff or Bailiff, from any other Perſon in his or their Cuſtody by Arreſt, if not executed in the Preſence of ſome ſworn Attorney of either Court, and his Name ſet and ſubſcribed thereto as a Witneſs, ſhall not be good; or of any Force, and upon Oath made, that the ſame was done, the ſame ſhall be ſet aſide, and the Sheriff or Officer may be puniſhed for ſo doing; and if Judgment be entered thereon, the ſame on Motion will be vacated and ſet aſide; and if Execution thereon be executed, the Party will have Reſtitution awarded him.

THAT where a Warrant of Attorney is given for confeſſing Judgment, to be entered of a certain Term after the Date thereof, the Judgment muſt be entered as of that Term; but if the Words "of any ſubſequent Term" be in the Warrant of Attorney, the Judgment muſt be entered within the firſt four Terms following the Date thereof; and if Judgment be not entered thereon within that Time, then it ſhall not be entered without Motion and Leave of the Court, upon Affidavit made that the Parties are living, and the Defendant unſatisfied; and if entered otherwiſe, the Court on Motion will ſet it aſide.

THAT every Judgment in Debt, Caſe, Covenant, Treſpaſs, Trover, or any other Action, ſhall be entered fairly on the Roll, or an *Incipiatur* thereof before ſuch Judgment ſhall be ſigned by the Secondary, or any Judge of this Court, and the

the Names of the Plaintiff and Defendant, with the County where the Action is laid, and the Nature of the Action, with the Attorney's Name, ſhall be entered in a Book to be kept by the Secondary of the Court for that Purpoſe, for which nothing ſhall be paid but the ancient and accuſtomed Fee for entering ſuch Judgment.

THAT no Record of *Niſi prius* ſhall be ſealed or paſſed at the *Niſi prius* Office by the * *Cuſtos brevium* of this Court, or any Clerk of the Office, before the Iſſue in that Cauſe be fairly entered on Record, or an *Incipiatur* thereof, and ſuch Entry with the Record of *Niſi prius* be put, brought to, and ſigned by the Secondary of this Court, for which no Fee ſhall be demanded or paid, but the uſual accuſtomed Fee due to the chief Clerk of this Court for entering ſuch Iſſue on Record.

Rule of *Trinity* Term, 1 Jam. 2, and *Michaelmas* 5 *An.*

THAT every Attorney ſhall bring in all his Rolls into the Office, fairly ingroſſed in a good full † Court-hand, by the Time limited by the Rules of this Court, (that is to ſay) the Rolls of *Trinity*, *Michaelmas*, and *Hilary* Terms, before the Eſſoign Day of every ſubſequent Term, and the Rolls of *Eaſter* Term before the Day of *Trinity* Term; and that no Attorney at large, or any other Perſon, ſhall take any Numbers, or file any Rolls, but the Clerk of the chief Clerks of this Court only.

Rule of *Michaelmas* Term, 5 *An.* Andr. 22. See Salk. 87. 2 Lord Raym. 850.

THAT no Bail-bond be put in Suit till four Days after the Return of the Writ, if the Arreſt be in *London* or *Middleſex*, nor till ſix Days after the Return of the Writ, if the Arreſt be in the Country.

THAT

* *Keeper of the Writs.*

† *See* 4 Geo. 2 *chap.* 26. 6 Geo. 2. *chap.* 14.

THAT if the Defendant be arreſted, and held to ſpecial Bail, and ſpecial Bail if required is not put in by the Time the Plaintiff might have had Judgment againſt the Defendant in the original Action, in caſe Bail had been put in at the Return of the Writ; in ſuch Caſe, altho' the Defendant ſhould afterwards put in good Bail, yet the Court will not ſtay the Proceedings on the Bail-bond if put in Suit.

Of Officers, Clerks, and Attornies of this COURT.

ACCORDING to the Rules of this Court, no Perſon ſhall be admitted to practiſe therein, as a common Solicitor, unleſs he be admitted an Attorney of ſome other Court, except he do only manage the Evidence at a Trial, or in caſe he be but a private Solicitor or Servant of a Corporation, or doth ſolicit only the Cauſe of his Maſter *.

No Perſon ſhall be admitted an Attorney of this Court, unleſs he has practiſed as a common Solicitor for the Space of five Years at the leaſt, or hath ſerved, or ſhall ſerve as a Clerk for the ſaid Space of five Years, to ſome Judge, Serjeant at Law, practiſing Counſellor, Attorney, Clerk, or Officer of one of the Courts of *Weſtminſter*, unleſs his Maſter die or give over the Practice within the ſaid Time, and that ſuch Perſon ſo offering himſelf to be admitted an Attorney ſhall, upon Examination, be found of good Ability and Honeſty for ſuch Employment, and ſufficient Proof to be put in Writing, ſhall be made of ſuch Service to the Prothonatary or Secondary of this Court, upon Deſire of Admittance, and filed without Fee *.

THAT

* *See* 2 *Geo.* 2. *chap.* 23. *made perpetual by* 30 *Geo.* 2. *chap.* 19 *Sect.* 75.

THAT all Officers and Attorneys of this Court be admitted of ſome Inn of Court of *Chancery*, and be in Commons one Week in every Term at leaſt, and take Chambers there if conveniently they can be had, elſe that they take Lodgings in ſome convenient Place near the ſaid Inn whereof they are admitted, where their Lodgings or Habitations are, except ſuch Perſons who are Houſekeepers or Inhabitants in *London*, *Weſtminſter*, *Southwark*, or the Suburbs thereof, and Liberty of the Tower of *London*, *St. Katherine's*; theſe, and ſuch as are ſworn Attornies of any Court within the ſaid Cities, Town, and Liberties.

THAT no Perſon practiſe in another Man's Name, nor that any Attorney ſhall knowingly ſuffer any other Attorney, or any other Perſon to practiſe in his Name, upon Pain of his being put out of the Roll. 2 *Geo.* 2 chap. 23.

THAT an Attorney diſmiſſed by one Court from his Practice for his Miſdemeanour, or otherwiſe, ſhall not after Certificate of ſuch Diſmiſſion be admitted to practiſe in any other Court, it being contrary to the Intent of the ſame.

THAT no Officer of this Court do act, or ſuffer any thing to be done in his Office, for or in the Name of one who is not a Clerk of the Office, or an Attorney of this Court, unleſs it be for the Clerk or Clerks then actually in their Service. Rule of *Michaelmas* Term, 1654.

THAT every Clerk of the Court, and alſo every Attorney duly paying his Fees to the Officer, may at any time, not being prevented by Rule of Court for that Purpoſe, file or ſearch the Files for any Declaration, with the proper Officer of that Court, without Payment of any thing for the ſame.

THAT

THAT every Attorney of this Court, who ſhall wilfully neglect to attend his Employment in this Court, by the Space of two Years, and can't aſſign thereof ſome Cauſe, or other lawful Excuſe to the contrary, to be allowed of by the Court, or unleſs hindered by Sickneſs, ſuch Attorney ſhall not be allowed his Privilege as one of the Attornies of this Court *.

Fortes 50. THAT no Perſon, without Rule of Court, Order of the Judge or Secondary, and Notice of the adverſe Party, or his Attorney, ſhall change or ſhift his Attorney; or if done by ſuch Order aforeſaid, ſuch Attorney newly coming in, is to take Notice at his Peril of the Rules in the Cauſe, whereunto the former Attorney was liable to take Notice, and ſhall alſo pay ſuch Attorney upon Demand all ſuch Fees as the Secondary ſhall tax to be due to him.

THAT where the Attorney for the Plaintiff or Defendant dies pending the Suit, and the Party whoſe Attorney is dead, will not retain another Attorney to manage his Cauſe, the Attorney againſt him may proceed, and is not bound to hinder his Client's Cauſe.

THAT a Retainer of an Attorney of the Court of *Common Pleas* or *Exchequer*, by an Attorney of this Court, and *e contra*, ſhall be a ſufficient Excuſe unto the Attorney ſo retained, acting according to ſuch Retainer; and the Attorney ſo retaining, without Warrant from the Party, to be liable to Puniſhment. Rule, *Michaelmas* 1654.

Of

* *See Lutw.* 1667. *Moor.* 123. *Cro. Eliz.* 392. *Lev.* 262. *Raſt. Ent.* 469. 6 *pt.* 1, 2, 3, 6, 8, 9. *contrary.*

Of Sheriffs, Clerks of Assize, and other Officers.

THAT every Sheriff have his Deputy in this Court, to return and receive Writs, and that every Deputy yearly, before *Hilary* Term, have his Name and the Place of his Reſidence in *London* or *Weſtminſter*, ſet or continued up in Tables of the Office of the Secondary for that Purpoſe, upon Pain of the Under-ſheriff's forfeiting for every Term that he ſhall make Default, the Sum of 20*l.* 23 Hen. 6 chap. 10.

THAT no Under-ſheriff or Bailiffs of Sheriffs or Liberties, be admitted during ſuch their Employment to practiſe as Attorneys, under Pain of Expulſion from the Imployment of Attorney, and not to be re-admitted. 1 Hen. 5 chap. 4. Rule of *Michaelmas* Term, 1654.

THAT every Under-ſheriff, upon reaſonable Notice given to him, deliver a true Copy of the Inventories of any Goods by him taken upon any *Fieri facias* or *Elegit* to the Party requiring the ſame, he paying for ſuch Copy not exceeding 3 *s.* 4 *d.*

IF any Sheriff, Under-ſheriff, and their Deputies or Bailiffs, or the Bailiffs of any Liberty, ſhall wilfully delay the Execution of any Proceſs or Execution, or ſhall take or require any undue Fees for the ſame, or ſhall give Notice to the Defendant, thereby to fruſtrate the Execution of any Writ or Proceſs, or having levied, ſhall detain it in their Hands, after the Time of the Return of their Writs, beſides the ordinary Courſe of their Amerciaments; the Contempt and Miſdemeanour appearing, the Officer ſo offending ſhall be liable to an Attachment, Information, Commitment or Fine, as the Caſe requires, and this as well, in the caſe of a late Sheriff, or Perſon Rule of *Michaelmas* Term, 1654.

Perſon before-mentioned, as of them that are in Office.

Also for Reformation of Abuſes by blank Warrants granted by Sheriffs, whereby Perſons are arreſted, and driven to extorted Compoſitions for their Liberty without Proceſs of Law; the Court doth forbid Warrants to be granted out to any Officer to arreſt or attach any Perſon before a Writ firſt come to the Sheriff; and the Court doth alſo forbid the taking of exceſſive and immoderate Fees by the Sheriff for Execution of Writs of Poſſeſſion, and Reſtitution of Poſſeſſion contrary to the Law, declaring that ſuch immoderate Fees ought not to be taken; and in caſe that ſuch ſhall be taken, that this Court will proceed to puniſh the ſame according to Law.

Rule of *Michaelmas* Term, 1654.

That the Clerks of Aſſize, their Deputy or Aſſiſtant, do perſonally appear with their *Poſteas* on the firſt Day of every *Eaſter* and *Michaelmas* Term, and the Deputy-ſheriffs, and all other Officers of the Court do perſonally appear by the Eſſoyn-day of every ſecond Term, and continue there during the Reſidue of the Term, without ſome juſt Cauſe to the contrary allowed by the Court.

Of Paper Books.

That every Clerk or Attorney of this Court may, according to the antient Rules of this Court, make up themſelves Iſſues and Demurrers in the ſeveral Caſes following, *viz.* every Iſſue that may be given on the Back-ſide, not guilty to a new Aſſignment, the Bar of *Son franche* Tenement, or *comperuit ad diem* to a Sheriff's Bond, *Nultiel Record* to a *Scire facias*, or Action of Debt upon a Judg-

a Judgment, a general Demurrer to a Declaration, an Action of Covenant, whereby the Defendant in his Bar concludeth, and *de hoc poſuit ſe ſuper patriam*, every ſpecial *non eſt factum*, every *Son Aſſault Demeſne*, all Iſſues or Demurrers upon every Writ of Error, *Scire facias*, and *Audita querela*, all Re-pleaders, or any thing formerly entered upon Record, but in no other Caſe whatſoever.

THAT in all ſpecial Pleadings, where the Plaintiff takes Iſſue upon the Defendant's Pleading, or traverſeth the ſame, or demur, ſo as the Defendant is not thereby let in to alledge any new Matter, there the Plaintiff may make up the Paper-book without giving a Rule to the Secondary to rejoin, *&c.*

THAT if any Paper-book be made up, and delivered in Term-time, or within four Days after Term, with a Rule thereon given by the Clerk of the Papers, for the bringing in the ſame Book to be inrolled, and the Defendant's Attorney doth not, within four Days after the Delivery thereof, bring back the ſaid Book and join with the Plaintiff in the ſpecial Iſſue or Demurrer made up, or wave his ſpecial Plea, and give the general Iſſue or Demurrer to any ſpecial Iſſue tendered, and pay for entering of his Part, Judgment may be ſigned and entered in any of the ſaid Caſes, as if no Plea had been pleaded. But if the Plaintiff's Attorney accept it after four Days, he may ſign Judgment afterwards, 7 Mod. 50. But where a Plea pleaded within Term, or in Time after Term, and the Paper-book is not made up, and delivered within eight Days excluſive after Term; if it be a Demurrer, the other Party is not bound to deliver back the Book, but hath Time ſo to do at any Time before the firſt four Days of the next Term; but if it be an

Iſſue

Iſſue to be tried at the *Aſſizes*, the Defendant's Attorney ſhall deliver back the Book four Days after the Delivery thereof, and pay for entering his Part, and join in the ſpecial Iſſue, or give the general Iſſue, and take Notice of Trial, or elſe the Plaintiff's Attorney may ſign and enter Judgment by Default, as if the Defendant had not pleaded at all; and where a Plea is not put in in Time, ſo that a Paper-book can't be made up and delivered within any of the Times aforeſaid; yet if the Plaintiff will accept of the ſame, and make up the Paper-book, the Defendant ſhall be obliged to take the Book, and return it again within four Days after Delivery, or elſe the Plaintiff's Attorney may ſign Judgment as aforeſaid, for the Defendant's Delay ſhall not tend to the Plaintiff's Prejudice.

THAT upon Delivery of any Paper-book wherein an Iſſue is joined, and Notice of Trial is given on the back of the Paper-book, if the ſame be afterwards waved, and the general Iſſue given, which the Defendant may do, the ſame Notice of Trial ſhall ſerve for the Trial of the general Iſſue which was at firſt given for the Trial of the ſpecial Iſſue.

THAT every ſpecial Plea, or ſpecial Demurrer in any Cauſe depending in this Court, ſhall be filed with the Clerk of the Papers of this Court, and that every ſuch ſpecial Plea or Demurrer ſhall be ſigned by ſome Council in that Behalf, retained before it be filed, and the Clerk of the Papers, in all Copies of ſuch ſpecial Pleas and Demurrers, alſo in all Paper-books by them to be made, ſhall ſubſcribe the Name of ſuch Council who ſigned ſuch ſpecial Plea or Demurrer, as well on Part of the Plaintiff as of the Defendant.

PENALTY

PENALTY for not filing COMMON BAIL.

If the Defendant does not file common Bail within eight Days after the Return of the Writ, upon a Certificate thereof from the Clerk of the Bails, and a Suggeſtion upon a Roll thereof, the Court will, upon Motion, grant a Rule for the Plaintiff to recover 5 *l.* *

N. B. AFTER you have taken ſuch Advantage, you can't force the Defendant to appear to that Writ, but you muſt ſue out another, and begin *De novo*.

* 9 *and* 10 *Wil.* 3. *chap.* 25 *Sect.* 33. 2 Stra. 737. *See now* 5 *Geo.* 2. *chap.* 27. *made perpetual by* 21 *Geo.* 2 *chap.* 3.

SOME

CASES

TOUCHING

WILLS

OF

LANDS and GOODS.

OF WILLS OF LANDS and GOODS.

WILLS are either nuncupative, or written. By a nuncupative Will at common Law, and now *Positis ponendis*, a Man might have disposed of any Goods and Chattels, but of Lands he could not, for the Stat. of 32 *H.* 8. *Chap.* 1. of Wills, requires that it be by Writing; so that if he made a Will by Word of Mouth only, if that were not reduced to Writing in his Life-time it was void for the Lands, though it might be good for the Chattles; but if it were written in his Life-time, though it were never brought nor read to him after the writing, it was good for the Lands, and for the Goods too. Nuncupative and written Wills, Godol. 11. Plowd. Com. 345.

If an Executor were named, for the 32. *H.* 8. *Chap* 1. only requires that the Will should be in writing, which it is, if what he said be writ down in his Life-time, though it be never shewed him; and so such Will were good, though never signed nor sealed by the Testator, for that neither of these were required by Act of Parliament, and the Deed is valid, tho' never signed by him that made it; to this Purpose is the Case in *Dyer*, where a man lying, sent for one to make his Will, who took Notes from him, and went away, and about eight of the Clock in the Morning, March. 206. Dy. 72. pl. 2. 2 Leon. 35. Sid. 315. Eq. Cas. abr. 402. pl. 2.

ing, began to write the Will out in Form, according to Law, taking Directions by the Notes he had writ, which he had finiſhed about ten of the Clock, and the Diviſor died at twelve, * *Ita ut non audivit dict. voluntat. lectam*, and this was held a good Will according to the Statute, 32 *H.* 8. *Chap.* 1. yet here was neither Signing nor Sealing by the Teſtator; and the like was adjudged in the Caſe of one *Olington*, where Articles were made by a Scrivener, and read to the Deviſor, and then the Deviſor died, and then they were wrote out at large by the Notes after his Death; the Reaſon of theſe Caſes ſeems to be, for that the Writing of the Notes, according to the Mind of the Teſtator, was a ſufficient Will in Writing, according to the Stat. 32 and 34, and 35 *H. Chap.* 5. and the writing of the Will afterwards at large, according to the Direction of the Notes, was a putting in Order and Form a Will made according to the Statute by the Notes; but now by 29 *Car.* 2. *Chap.* 3. ſuch Will could not be good, for that Act requires the Teſtator ſhould ſign his Will, or that ſome other, by his Direction, ſhould do ſo, and that it ſhould be atteſted and ſubſcribed by three credible Witneſſes, in the Preſence of the ſaid Deviſor, ſo that ſuch taking of Notes could not be a good Will, for that not only Writing is required, but Subſcribing and Witneſſes; but if ſuch Notes are ſigned by the Deviſor, and ſubſcribed by Witneſſes, it ſeems it could be a good Will, as 'twas before the Stat. but it ſeems, that if ſuch Notes were drawn out into a formal Will afterwards, that would not be a good Will within the Stat. for that it would want Signing and Sealing, and the Miſchief the Statute was made to avoid, would ſtill be, *viz.* Perjury, for neither the Hands of the

And therefore 5 Eliz. cap. 14. makes it Perjury to forge a Will.

* *So that he did not hear the ſaid Will read.*

the Deviſor, nor the Witneſſes appearing, it would be difficult to find out any Falſity in thoſe that ſhould ſwear, and ſo they would be encouraged to ſwear any thing: 'Tis ſaid in the Margin of that Caſe of *Sackvile* and *Brown* in *Dyer*, that a Man deviſed Land to his three Daughters by Parole, and his Friends went and put it in Writing, without any Direction from the Deviſor, and then came and aſked him if he affirmed his Will, which was ſhewn him, and he being acquainted with the Effect of it ſaid that he did, yet 'tis ſaid to be reſolved that it was a void Deviſe, becauſe he himſelf gave no Directions to what Perſon the Demiſe ſhould be made; and in the ſame Margin, 'tis ſaid to be held 30 *Jac.* * *per touts les Juſtices*, that the Deviſor ought to give Commandment for the writing, or elſe that the Will is not a good Will, but *quære?* for there is a Caſe, where a Man being nigh the Point of Death, makes his Will by Parole, another ſtanding by doth, without his Privity, immediately put it in Writing before his Death, and the Will was held a good Will. Two Things are required (ſaith *Wray*) to the Perfection of a Will for Lands; Writing, and this *in initium*, and the Death of the Deviſor, and this is *Conſummatio*, by which it appears he was of Opinion, that neither Signing nor Sealing was requiſite, or declaring it to be his laſt Will and Teſtament; *quære* whether that be neceſſary now ſince the Statute of † Frauds and Perjuries? for the Act mentions nothing of it, but only requires the Deviſor to ſign it, and that it be atteſted and ſubſcribed by three credible Witneſſes, the Intent of which may be only to make it appear more plain, that that was the ſolemn Deſign of the Deviſor at that Time, and that it

Dy. 72 a pl. 2.

Good Deviſe, Cro. Eliz. 100. pl. 3. Lev. 113. pl. 155.

3 Lev. 79. 'tis only a Caſe cited, and the Caſe is in 3 Cro. 109. Lev. 113. *per tot Cur.* that the Deviſe is void if the Will be ſigned by Witneſs, and after a Codicil annexed, ſigned, by three, this is a good Will for the Codicil-part of the Will; but if there be two Witneſſes to the Will, and two to the Codicil, this is not ſufficient, if there are not three to the whole, *per Treby.*

† 29 *Char.* 2 *chap.* 3.
* *By all the Juſtices.*

ſhould go for his Will, to prevent the inducing of any Leaſewrit, without much Deſign or Forecaſt from being made his Will, and alſo to prevent any counterfeit Wills, and for that Reaſon that Part of the Clauſe ſeems to be added, *viz.* that they ſhould atteſt it in the Preſence of the Deviſor, and perhaps he may be ſpeechleſs, and cannot be able to declare it to be his laſt Will and Teſtament; if one commands another to write his Will, and thereby to deviſe *White* Acre to *J. S.* and his Heirs, and *Black* Acre to *St. N.* and his Heirs, and he writes the Deviſe to *J. S.* in the Life-time of the Teſtator, and before he writes the Deviſe to *St. N.* the Deviſor dies, yet this Deviſe to *J. S.* is good; this proves, that before 29 *Car.* 2. *Chap.* 3. neither Signing nor Sealing, or the Subſcription of the Witneſſes, was any ways neceſſary to the perfecting of a Will; but if the Deviſe had been to have been made to *J. S.* and his Heirs upon Condition, and he had writ the Deviſe to *J. S.* and his Heirs; but before the writing of the Condition the Deviſor had died, then the Deviſe had been void, becauſe it was not perfect before the writing of the Conditions; but in the other Caſe, the Deviſe to *J. S.* and *St. N.* were too diſtinct ſeparate Deviſes, the one no ways depending on the other, and ſo the Deviſe to *J. S.* was perfect without any Deviſe made at all to *St. N.* the Deviſe that is good within the 32 *H.* 8. muſt be a perfect Deviſe in Writing, and nothing muſt be ſupplied by Words to make out the Deviſe, to be a perfect Deviſe; for if what he wrote be not a perfect Deviſe, it can't be helped out by Parole, adding that which was wanting to make the Deviſe perfect: One orders another to make his Will, and thereby gives ſuch an one an Eſtate for Life, the Clerk miſtakes, and gives it him in Fee, this avoids the De-

3 *Cro.* 31. this ſeems to be of uſe in caſe of Lands, for a Will of them muſt be ſigned and ſubſcribed by Witneſſes, which will make it perfect; but in caſe of Goods it ſeems to be otherwiſe, Godol. Orph. Leg. 35.

viſe for the whole, and he ſhall not have an Eſtate for Life; for no Will can take Effect but what is written, and there is no Deviſe for Life made; and the other cannot be good, becauſe not the Will of the Deviſor.

A WILL was good before 29 *Car.* 2. though it were not ſigned by the Deviſor, nor his Name to the whole Will, for that might be helped out by Averment; but that Statute requires a Will to be ſigned by the Deviſor, or ſome other by his expreſs Directions, ſo that now there muſt be a Signing, but it doth not ſeem to be neceſſary that the Name of the Deviſor appear in a Will, for a Mark is ſufficient, as it ſeems, if a Man cannot write; but yet *quere*, whether that be ſigning within the Act of Parliament, for there is a Proviſion made, if the Deviſor cannot write, by his giving Orders for ſomebody elſe to ſign for him; but if he loſe his Voice, and cannot write, then if his Name were required, ſuch a Perſon could not poſſibly make his Will, which yet is a common Caſe; ſee the Caſe of *Bertie* and *Falkland*, where it was held by *Holt*, that at common Law, a Will could not be explained by any other Writing, but the Conſtruction was to ſtand wholly upon the Senſe of the Words in the Will; and 'tis much more ſo ſince the Statute of Frauds and Perjuries, as *Treby* and my Lord Chancellor both held; ſee *Vernon's* Caſe 4. *Co.* 4. a Letter importing a Diſpoſition of Lands hath been held to be a good Will within the 32 *H.* 8.

Salk. 231. 3 Chanc. Caſ. 129. 2 Vern. 333. 12 Mod. 182, S. C.

Jenk. 115. pl. 26.

More. 177. pl. 314.

A NUNCUPATIVE Will at common Law was of as great Force, as to the Diſpoſition of Goods and Chattels, as a written Will was, and after his Death it was reduced to Writing, and the Seal of the Ordinary was affixed thereto; the appointing of an Executor is an eſſential Part of a Will, for if a man makes ſeveral Deviſes, *&c.* and appoints

Godol. Orph. Leg. 13. Wentw. Office, Ex. 9. Noy 12.

points no Executor, he dies inteſtate as to his Goods and Chattels, for as to Land, a Will is good, tho' there be no Executor named, for an Executor hath nothing to do with the Lands and Tenements; but tho' ſuch a Signification of the Teſtator's Mind as to the Diſpoſition of his Goods, *&c.* be no more properly to be called a Teſtament, than every Deed wherein he expreſſes his Mind, to grant ſuch and ſuch things, may be called a Teſtament; yet 'tis not altogether of no Force and Validity, for ſince there is an Expreſſion of the Teſtator's Mind for the Diſpoſition of his Goods in this or that Manner, ſo far it ſhall be of Effect, that the Diſpoſition ſhall be made according as he hath expreſſed his Mind, and therefore ſhall Adminiſtration be granted to the next of Kin, * *cum Codicillo annexo*, as it is when a perfect Will is made, and the Executor refuſes; if the Teſtator make Diſpoſition of his Goods, *&c.* by Writing, and appoint his Executor by Word of Mouth, this is not a written Will, but a Will nuncupative, becauſe one eſſential Part of the Will is wanting in the Writing, *&c.* the Appointment of an Executor; a Teſtament (ſaith *Godolphin*) as ſuch may be valid and good without the expreſs Inſtitution or Appointment of an Executor therein, in caſe the Teſtator, touching ſuch Inſtitution or Appointment, diſtinctly and poſitively refers himſelf therein to ſome other certain Writing made by him; in ſome other Place he cites an Opinion out of *Wentworth*, that an appointing him Executor who is named in ſuch a Note left with *C. D.* is not a ſufficient making him an Executor at all; to reconcile them, it ſeems it muſt be underſtood, that 'tis no ſufficient appointing of an Executor to make a written Will, becauſe the appointing of an Executor

Wentw. Office, Ex. 16.

Godol. Orph. Leg. 12.

Wentw. Office, Ex. 21. Godol. Orph. Leg. 11, 12, 76.

* *With the Codicil annexed.*

cutor is left out of the Will; but ſurely it will be a good nuncupative Will, if not a good written Will; for why ſhould not ſuch an Appointment be good, in caſe where the Teſtator had made a Diſpoſition by Writing, as well as if he appoint an Executor by Word of Mouth, where he hath made Diſpoſition by Writing of his Goods and Chattels, *&c.* ſays, that one Advantage there is in a Will written above a nuncupative is, that the Witneſſes can't know what is in it, for 'tis ſufficient for him to ſay this is my laſt Will and Teſtament, or the like; but *quere*, whether the Will be not good without ſuch Declaration.

LANDS and Teſtaments deviſeable by Cuſtom at common Law, might paſs by Will-nuncupative, and therefore there ſeems, for that Reaſon, expreſs Proviſion to be made by the Statute of Frauds and Perjuries; a Deviſe of Lands is more properly called a laſt Will than Teſtament, for Teſtament is properly where an Executor is appointed.

A DEVISE of Legacies to pious Uſes, or *inter Liberos* may be good, though made at the Interrogation of another; the Deviſor intended Lands to *J. S.* the Remainder to *J. D.* in Fee, and after the Deviſe to *J. S.* was written, but before the Remainder to *J. D.* the Deviſor died, held *per Cur.* to be a void Deviſe for the whole, becauſe the one depended on the other; and if the Deviſe for Life ſhould be good, the Tenant for Life would take the Eſtate otherways than the Deviſor intended he ſhould have it, for now he will be Attendant to the Heir, whereas by the Deviſe he was to be Attendant to the Lord. A Will made in Sickneſs, by reaſon of the Importunity of the Wife, and to be freed from her vexatious Solicitations, will, as it ſeems, be ſet aſide in Equity, but it ſeems to be good at Law, tho' a Sequeſt of Goods makes not a Will without nam-

Sty. Rep. 427. 8 Vin. Abr. 167. pl. 7. B.

ing an Executor, yet naming an Executor, without more doing, is a good Will, for by the naming him, he is a good Perſon appointed to ſue, and to be ſued to pay the Teſtator's Debts; and 'tis yet eſſential to a Will, that there ſhould be Legacies made, and the making one Executor after the Debts paid is a Diſpoſition of all the Teſtator's Goods, *&c.* unto him, ſo that nothing further remains; and the appointing an Executor is an appointing a Repreſentative and an Aſſiſtant, to do many things, and to have many other things done to him, and nothing elſe can be done by Will: Thus ſtood the common Law concerning nuncupative Wills, but now great Alteration hath been ſuperinduced by the * Statute of Frauds and Perjuries, which tho' it leaves nuncupative Wills as they were before, where the Eſtate deviſed exceeds not 30 *l.* and in caſe of Soldiers being in actual military Service, or in caſe of Mariners being at Sea, yet in other Reſpects and Caſes, it hath almoſt taken away nuncupative Wills; for to be good within the Act, it muſt be made in the laſt Sickneſs of the Teſtator, whereby Perſons in Health are reſtrained from making nuncupative Wills, and Perſons ſick, unleſs it prove their laſt Sickneſs; the Perjuries ariſing by theſe nuncupative Wills were ſo frequent, that it ſeems the Deſign of the Act takes them away, as much as it could be with Conveniency, and therefore, ſince Perſons in Health have Time and Leiſure, and may have Advice enough to make their laſt Wills, the Act, to prevent Perjuries, reſtrains them from making any nuncupative Wills; but becauſe ſome Perſons are ſo ill adviſed, and ſome ſo ſuperſtitious, as not to make their Wills in the Time of their Health, becauſe when ſick they may

* 29 *Char.* 2. *chap.* 3.

may not have Time enough to make their Wills in Writing, therefore in ſuch Caſe the Act allows them to make nuncupative Wills; but to prevent as much as poſſibly it could the Perjuries ariſing by ſuch Wills, and to make it more certain that it was the Deſign of the Teſtator to make ſuch a Will, the Act requires that three Witneſſes ſhould be preſent at the making of the Will, and the Teſtator at the Time of pronouncing the ſame, to ſhew *Animus teſtandi*, muſt bid the Perſons preſent, or ſome of them to take Notice, that it is his Will: The Act doth not require that he ſhould bid the Witneſſes take Notice, *&c.* but ſome of thoſe preſent; but if ſuch ſick Perſon recover his Health, and thereby is out of the Reaſon of the Law for permitting Perſons in that Condition, for Neceſſity's ſake, to have the Privilege of making a Will nuncupative, and he now hath Time and Opportunity to make a Will in Writing, as well as other Perſons; therefore ſuch nuncupative Will as aforeſaid will not then be good; and leſt ſuch ſick Perſon ſhould, by going to another Houſe than where he was ſick, thereby expoſe himſelf to be perſuaded by the Importunity of thoſe there to make ſuch Will-nuncupative as may be unreaſonable; the Act requires the Will ſhould be made in the Houſe of his or her Habitation or Dwelling, where he may be reaſonably ſuppoſed to be among thoſe of the ſame Intereſt with him, or related to him, or elſe he muſt have been reſident there where he makes his Will, for the Space of ten Days or more next before the making ſuch a Will; for the Deſign of the Act was not to reſtrain a Man from making a nuncupative Will in any other Place but his own Houſe, for that had been unreaſonable, but only ſo far as by being in another Place he might be expoſed

to

to the Solicitations of People of another Intereſt, and thereby might be perſuaded to make what would be unreaſonable, therefore the Act gives him Leave to make a Will in a Houſe where he hath been reſident for the Space of ten Days next before; which is ſo long a Time in Caſe of Sickneſs, that it may be reaſonably preſumed, that he was not brought there to be perſuaded into the making his Will, by the Direction of thoſe there about him; but becauſe there may be a Caſe wherein a Man may be neither in the Houſe of his own Habitation or Dwelling, nor have been reſident there for the Space of ten Days, and yet it may be unreaſonable to hinder ſuch Man from making his Will, therefore is this Exception added in the Act, except where ſuch Perſon was ſurprized or taken ſick, being from his own Houſe, and died before he returned to the Place of his or her own Dwelling, in which Caſe it was highly reaſonable ſuch Perſon ſhould have Liberty to make his Will, for it cannot be ſuppoſed there was any Deſign upon him in the Place where he fell ſick; but becauſe when ſuch an Accident hath happened, the Perſons about him may improve it to their own Advantage, therefore was the Clauſe added, "and "died before his or her Return to the Place of "his or her Dwelling;" for if he be ſo well as to return home, he may reaſonably be ſuppoſed well enough, and to have Time enough to make his own Will at his own Houſe, and by this means all Manner of Suppoſition of the Wills being made by the Appointment of another Perſon will be taken away; and becauſe in Proceſs of Time the Words of the Teſtator may ſlip out of the Memory of the Witneſſes, no Teſtimony ſhall be received to prove any Will-nuncupative after ſix Months after the ſpeaking of the ſaid teſta-

teſtamentary Words, unleſs the ſaid Teſtimony, or the Subſtance thereof, were committed to Writing within ſix Days after making the ſaid Will: it ſeems ſufficient within the Act, if the Teſtimony were written down any how, tho' not ſingly and apart by the reſpective Witneſſes; for the Act only requires the Teſtimony ſhould be writ, and doth not appoint how or by whom; and for the further Prevention of Fraud, it is required by the Act, that no Letters teſtamentary, or Probate of any nuncupative Will, ſhall paſs the Seal of any Court till fourteen Days at leaſt after the Deceaſe of the Teſtator be fully expired; nor muſt it be proved till Proceſs have firſt iſſued to the Widow, or next of Kin to the deceaſed, to the End that they may conteſt the ſame if they pleaſe; but this Act of Parliament extends not to Goods, *&c.* diſpoſed of by Will in Writing, for it only mentions Nuncupative-wills; and tho' the Act ſaith, no Deviſe of Lands, Tenements, or Hereditaments, *&c.* yet that ſeems not to extend to Chattels real, as Leaſes for Years of Land, but only to Freehold Lands, *&c.* for it doth not there ſeem the Deſign of the Act of Parliament to take away the Power of diſpoſing of Leaſes for Years of Land by Will-nuncupative, but only to appoint how Freehold Lands ſhall be diſpoſed by Will; and this appears plainly by the Words of the Act itſelf, which are, that no Lands, *&c.* deviſeable by the Statute of Wills, or by Cuſtom, *&c.* in neither of which were Leaſes for Years included, for they were deviſeable by the common Law; ſo that this Act of Parliament, extending only to make ſome Alteration of the Law about Nuncupative-wills, and not to Wills made in Writing, for the Diſpoſition of Goods, *&c.* 'Tis good to ſee how the Law ſtands

Godol. Orph. Leg. 6, 78.

ſtands in theſe Caſes; the civil Law was very ſtrict in theſe Caſes, requiring ſeven Witneſſes, Signation and Sigillation by the Teſtator, unleſs the Will were *inter liberos*, or *ad pios uſus*, in which Caſes, even by the civil Law, the Will was good, tho' theſe Solemnities were not had; but *jus gentium*, or the common Law, which our Law agrees with, were not ſo ſtrict; and therefore by our Law nothing more is required to the making good a Will for the Diſpoſition of Goods and Chattels, than the Appointment of an Executor, and the Signification of the Teſtator's Mind, whether by Word or Writing; but as to the Will by Word I have already treated, and the Will by Writing requires nothing but the Appointment of the Executor, and the Expreſſion of the Teſtator's Mind, nay, the very appointing an Executor is a ſufficient Will, as before hath been obſerved, and no Subſcription by the Teſtator, or Witneſſes, or Sigillation, by either of them, or Declaration by the Teſtator, that 'tis his laſt Will and Teſtament, is required to make the Will good; but if it any ways appears by the Teſtimony of two Witneſſes, that 'twas the Will of the Teſtator, 'tis ſufficient; the Will of the Teſtator ought to be independant and voluntary, without the leaſt Circumvention, Fear, Fraud, Flattery, or Dependancy on the Will of any other; an Executor (ſayeth *Godol.*) cannot be appointed in a Codicil, *i. e.* primarily appointed or inſtituted, but they may be ſubſtituted or added in a Codicil; the Reaſon of this ſeems to be, for that a Codicil is only for the Alteration of a Will already made; and if no Executor be appointed by the Will, but only by the Codicil, that is more a Will than the Will made before; but yet it cannot take Effect as a Will itſelf, becauſe deſigned only

only to alter the Will of the Teſtator, expreſſed in a precedent; but *quere*, why they both together cannot make but one Will, ſo that the laſt ſhall be ſtiled the Will properly, and the other preceding, the Codicil to it?

A MAN ſeiſed of Lands in Fee, makes a Writing in this Form: "This Indenture made the, *&c.* between *C. W.* of the one Part, and *J. O.* and *W. S.* of the other Part," and then makes a Recital, that "whereas, *&c.*" and then goes on; "*Now* the ſaid *C. W.* in Conſideration of 5 *s.* doth grant, bargain and ſell to the ſaid *J. O.* and *W. S.* all thoſe Lands in Truſt to ſell after his Deceaſe, the Money raiſed by Sale to be employed as follows;" and then names divers Perſons to receive divers Sums; and then ſaith, "and the reſt of my Money I give and bequeath, *&c.*" and then adds, "and hereby I name the ſaid *J. O.* and *S. W.* my Executors;" and whether this was a Will or no was the Queſtion, and held that it was, notwithſtanding its odd Form; the Intent of the Deviſor being ſo. A Letter held to be a good Will: A Will was made in this Manner; "I will that my younger Children not married, *viz. Edward*, *Thomas*, *Chriſtopher*, ſhall have ſuch ſeveral Annuities as be expreſſed in ſuch ſeveral Writings, ſigned with my Hand, and ſealed with my Seal, according to the true Meaning of the ſaid Writings;" this was held to be a good Will in Writing, for that which the Will referred to, and which took Effect, as Part of his Will was in Writing, and ſo a written Will within the Intent of the Act of Parliament; but it was held that a Will cannot refer to Words, for then thoſe Words being Part of the Will, it will not be a written Will within the Intent of the Act of Parliament, becauſe the Words referred to will

Chanc. Caſ. 248. Mod. 117.

Moor. 177. pl. 314.

operate as a Deviſe, and not be written; for what the Will refers to, to have its Operation, muſt be Part of the Will, for it takes Effect as ſuch: The Party takes by virtue of the Thing referred unto, and when he doth take, he takes as a Deviſee; and if, becauſe the 32 *H.* 8. requires Wills to be in Writing, nothing can be referred to but what is in Writing, becauſe elſe it will not be a Will in Writing only; by the ſame Reaſon, if a Will now refers to any thing, it muſt have all the Qualifications as the Will itſelf muſt have by the * Statute of Frauds and Perjuries, becauſe 'tis Part of the Will, and that Statute requires that Wills ſhould have ſuch and ſuch Qualifications; a Man makes his Will, and deviſes his Lands in ſuch Manner, and to ſuch Perſons as he had appointed, by a Deed of Feoffment which he had before executed to divers Uſes, but had made no Livery thereon, yet held a good Will. A Will in looſe Papers, and not ſubſcribed by the Deviſor, held a good Will; ſo a Will in this Manner was held to be good.

THE 20th Day of *June* 1663,

Sid. 362. pl. 7. 2 Keb. 345. pl. 23.

MEMORANDUM, that Mr. *Samuel Bates* did declare and expreſs, that his Brother *J. Bates*, and his Heirs, ſhould be his Heir to his Lands: This was writ by a Doctor of Phyſick, but publiſhed by the Deviſor, but not ſubſcribed. A Deed indented, ſealed, and delivered, with Covenants on each Part, allowed as a good Will, the Intent being ſo.

Mod. Rep. 117.

OF Wills, ſome are privileged, and ſome are unprivileged; privileged are the Wills of Soldiers in actual military Service, and † *Inter liberos et ad pios uſus*; the firſt are privileged ſo far, that they be under ſome perſonal Diſabilities which diſable other People, yet they are not thereby diſabled;

* 29 *Char.* 2. *chap.* 3.

† *Among Children, and to pious Uſes.*

disabled; and if they make two Wills both shall stand; whereas if others make two Wills, the last revokes the former, because the Appointment of an Executor is a Disposition of all Goods, &c. to him, which are not disposed of in the Will; and so the several Rights that the Executor of each Will hath will be inconsistent. A Testament *inter liberos* is privileged so far, that if there be two Wills of divers Tenures, and it doth not appear which is last, that shall be last that is made in favour of the Testator's Children; and Testaments made in favour of Children are not so easily revoked as other Testaments are, and therefore shall such a Will take Effect, tho' there be no Witnesses to prove it to be the last Will; if it can be proved it was writ by the Testator, or by his Order. Testaments *ad pios usus* are privileged, in that if they be found cancelled, and 'tis not known whether the Testator did willingly cancel the same, the Law presumes 'tis unadvisedly done, and therefore the Will shall stand; but in other Testaments, if they are cancelled, 'tis presumed to be done willingly; whereas, in other Testaments or Legacies, the Condition ought to be strictly performed, in these, 'tis sufficient if it be done by any Means, tho' not appointed by the Will.

Testaments *ad pios usus* are not void for Uncertainty, as other Wills are; and generally those Privileges which belong to other Wills, belong to these. A Devise to ecclesiastical Persons is reckoned among those Cases the Law calls favourable; when 'tis for Utensils of the Church, &c. 'tis more favourable; and when for the Redemption of Captives 'tis most favoured. Codicils might be made either in Writing or by Word of Mouth; but now it seems they can't be

made by Word of Mouth, becauſe the * Statute of Frauds, *&c.* ſaith, that no Will, *&c.* and a Codicil is a Will though it be not a Teſtament; neither can a written Will be altered by a Codicil in Words, except the ſame in the Life of the Teſtator be committed to Writing, and after the Writing read unto the Teſtator, and allowed by him, and proved to be ſo done by three Witneſſes at the leaſt; for the Act ordains, that no Will, *&c.* ſhall be altered by Words or Will by Word of Mouth, within which Codicils are comprehended. Codicils may be made either before or after the Teſtaments, for in both Caſes they are reputed as Part and Parcel of them, unleſs being made before they are repealed by the Teſtament, or are contrary to ſomething in the Teſtament. A Man may have divers Codicils, and the one ſhall not, as in the Caſe of Wills, revoke the other, unleſs they are contrary to one another; and in ſuch Codicils, if it do not appear which is firſt or laſt done, and the ſame Thing be given to one in one Codicil, and to another in another, they ſhall ſhare the Thing, and the Codicils are not void; if it appears in this Caſe, which Codicil was laſt, then it ſeems they ſhould not ſhare the Thing; but the firſt Codicil as to that Thing, ſhould be void. The making of Teſtaments, (ſays *Godolphin*) are two-fold; the one Active, and the other Paſſive.

Active, when the Perſon making lies under no Diſability; Paſſive, when he that's Executor, or Legatee, lies under no Diſability, but may be Executor, or take; and as to this, he ſaith that ſome are *indigni*, and to them a Deviſe is only voidable, but others are incapable; and as to them Deviſes are wholly void; but *quere* as to this:

* 29 *Char.* 2. *chap.* 3.

this: For, if an alien Enemy be made Executor, or any thing be deviſed to him, it ſeems the King ought to have the Executorſhip, or the Legacy, and ſo in the like Caſes; but *quere.* Such as are prohibited by reaſon of ſome legal Impediments, as Outlawry, *&c.* and ſuch as are criminous are alſo prohibited. My Lord *(a) Coke* ſaith, 'twas aſſented by the Biſhops, Lords, and Commons, that the King may make his laſt Will and Teſtament, but he doth not ſay of what. *(b)* He that makes his Will, muſt be able not only to anſwer common Queſtions, or the like, but muſt be of ſuch Underſtanding, as to be able to diſpoſe of his Eſtate with Diſcretion and Judgment. By the civil Law, an Infant of the Age of fourteen, if Male, may make his Will, and Female of the Age of twelve, and thereby may diſpoſe of their Goods and Chattels; but my Lord *Coke* ſaith he cannot, tho' an Infant of eighteen may; but one of ſeventeen makes his Will, for ſo I have heard is the Opinion of *Holt*; and if the common Law in this Point be againſt the Law of holy Church, it ſeems Prohibition lies to hinder their Probate of a Will, for elſe the Common Law is to no Purpoſe, and the Statute of 32 *H.* 8. ordains, that if one dies inteſtate, Adminiſtration ſhall be granted to the next of Kin; and the Conſtruction of Acts of Parliament, and the putting them in Execution, belongs to the Judges of the common Law, therefore, if one die under ſeventeen, and the common Law adjudges him to die inteſtate, tho' he have made a Will, becauſe he is not of Diſcretion enough to make a Will, the Judges ought to ſee the Statute of 27 *H.* 8. put in due Execution *. If one under the Age of making of Wills make one, and then comes

Alien Enemy, Extor. Went. 15. Cro. Eliz. 142. Ow. 45.

Outlawry in Extor. Chro. Car. 8, 9. Rol. Abr. 914, 915. Godol. Orph. Leg. 37, 38. Vern. 184. Eq. Abr. 37 pl. 1. Co. Lit. 128. Noy Max. 7. Gill. Hiſt. Chanc. 54. Went. Off. Ex. 106.

Criminous.

King may make his Will, ſee 11 Vin. Abr. 221. pl. 7.

(*b*) Mo. 760. pl. 1051.

Underſtanding and Judgment neceſſary in Teſtator. Male Infant of fourteen, Female of twelve, may make Will of perſonal Eſtate. Noy compl. Lawy. 99. Perk. Sect. 503.

Conſtruction of 32 Hen. 8. chap. 1.

* Pl. Com. 344. Will made under Age void, tho'

(*a*) 4 *Inſt.* 335. *Godolph. Orph. Leg. Law* 76.

ratified at full Age; parole Ratification good.

to his full Age, but dies without ratifying it, the Will is void; it ſeems Ratification may be by Word only, and be good, notwithſtanding the

Conſtruction of 29 Char. 2. chap. 3.

Statute of Frauds and Perjuries; for tho' that Act ordains, that no written Will ſhall be altered by Words, *&c.* yet it doth not enact, that no written Will ſhall be confirmed by Words, if an Infant cannot by Cuſtom make a Will till four-

Infant of Age laſt Day of Non-age, ſee 8 Vin. Abr. 55. pl. 20.

teen, 'tis ſaid by *Godol.* that if Infants attain to the laſt Day of the Age of fourteen, they may make their Will as well as if the Day were actually expired; but *quere.*

Madmen cannot make Wills but in lucid Intervals. Wentw. 15. Swinb. chap. 2. Sect. 3. 1 and 3 Part.

MAD Perſons can make no Teſtament during their Inſanity, no not *ad pios uſus*, nor tho' they after recover their Senſes, but in a lucid Interval they may make their Wills.

EVERY Perſon making a Will, is preſumed to be of a ſound Underſtanding, till the contrary be proved, ſo that the *Onus probandi* lies on the other Side; if the Teſtator uſed to have his Fits and lucid Intervals, and it cannot apppear whether the Will be made in the one or the other Time, it ſhall be preſumed to be made in the lucid Intervals, if there be no Argument of Folly in the Will; nay, tho' the Teſtator had no lucid Intervals, yet, if it cannot be proved that he was mad at the Time of making the Will, it ſhall be preſumed there was an Intermiſſion of Madneſs, if the Will be a ſenſible orderly Will, but the leaſt Word of Folly in ſuch a Will will overthrow it; on the other hand, if one be a very Idiot, and make a good ſenſible Will, yet the Will ſhall ſtand; it ſeems it ſhall not be meaſured whether a Man be an Idiot or no from his being able to meaſure an Ell of Cloth, or tell twenty, or the like; but whether he have Senſe enough to diſpoſe of his Eſtate with Underſtanding.

ing. Perſons grown Childiſh by reaſon of extreme old Age, cannot make their Will; nor one that is actually drunk, if he be ſo drunk as to have loſt the Uſe of his Reaſon: There's a Proviſo in the 34 *H.* 8. c. 5. That no Wills made of any Lands, Tenements, or other Hereditaments, by any *Femes covert*, Infants, Idiots, or Perſons of non-ſane Memory ſhall be good, within which may the Perſon aforeſaid be brought. Perſons by the civil Law are inteſtable for want of Freedom, as Captives in War; but Captives by Pyrates are not inteſtable; *quere?* but there is no ſuch Diſability laid upon any Perſons, as to Land, by the Statute; ſo that it ſeems the Wills of ſuch Perſons may not be avoided for Lands. Lord of a Villein may ſeize the Goods before Probate; it ſeems Perſons condemned to perpetual Impriſonment may make their Wills if they forfeit not their Eſtates by the Crimes they have committed: It is expreſly provided by 34 and 35 *H.* 8. c. 5. that Women Coverts ſhall not make their Wills of Lands; the Reaſon is, for that being ſubject to the Governance and Direction of their Huſbands, they cannot be ſuppoſed to have that Freedom of Mind that is abſolutely requiſite to the making their Wills; but on the other hand, being ſubject to the Pleaſure of their Huſbands, for, to be ſure, they would not permit them to make ſuch Wills contrary to their Inclinations, therefore a Cuſtom, that a *Feme covert* ſhall make a Will, is a void Cuſtom, if there be no Reaſon to make it good; becauſe, in the very Nature and Eſſence of a Will it ought to be made according to the Direction and Pleaſure of the Maker, and not of any Body elſe, which 'tis very reaſonable to ſuppoſe a *Feme covert* wou'd be; for no Cuſtom can take the Woman *Covert*

Aged Perſons, Wentw. 15. Swinb. 74. Part 2. Sect. 5.

Drunkards Swinb. 75. Part 2. Sect 6.

Femes Covert.

Femes Covert cannot make Wills of Lands.

Cuſtom for *Femes Covert* to make Wills, is void.

out of the Power and Direction of her Huſband, and therefore there can be no Reaſon in ſuch a Cuſtom that will countervail or evade the Reaſon upon which the Policy of the Law is grounded, in not ſuffering Women *Coverts* to make a Will, as is judged in 3 *Ed.* 3. yet ſee *Sopewith*'s Caſe, that ſeems *contra*, and *Coke*'s Copy-hold dubious; and therefore if a *Feme covert* makes a Will, 'tis void, nay, if before Marriage ſhe make a Will, and then marry, this is a Countermand of the Will, as well where the Deviſe is made to a Stranger as to her Huſband, for 'tis againſt the Nature of a laſt Will, to be ſo abſolutely irrevokable, that let the Diviſor do what he will it muſt ſtand; and this would be the Caſe of every Will made by a Woman ſole, if the Marriage were not a Countermand; for when ſhe is married, ſhe hath no Power either of revoking or continuing it, but at the Will of her Huſband; to prevent which Inconvenience, the Law adjudges Marriage a Countermand; in the Reſolution of *Forſe* and *Hembling's* Caſe, 'tis ſaid, that upon the whole Matter, *viz.* taking of Huſband and *Coverture* at the Time of her Death, the Will was countermanded, ſo that 'tis not put wholly upon the Marriage, but alſo upon her dying during the Coverture, ſo that ſhe had no time to revoke or continue the Will; but afterwards 'tis ſaid, that the taking of Huſband, in the Caſe at Bar, being the Woman's own Act, ſhall not be a Countermand of the Will, ſo that there it ſeems to be put upon the taking of Huſband; ſuppoſe then a Woman ſole make her Will, and thereby deviſe Lands to *J. S.* and then ſhe marries, and then the Huſband dies, ſhall *J. S.* take by this Deviſe? for if the Marriage alone be a Revocation, then it ſeems he ſhall not, becauſe the Death of the Huſ-

Marriage countermand of a *Feme Covert's* Will, 4 Rep. 60. Ander. 181. pl. 217. Goldeſb. 109. pl. 16. 2 Wms. Rep. 624.

4 Co. 60, 61.

Huſband doth not ſeem to amount to a Revival; but if the Marriage and Death of the Wife during the Coverture, make the Revocation, then it ſeems *J. S.* ſhall take by the Deviſe. *Manwood* was of Opinion that ſuch a Will would be good, for he inſiſted that the Will took its Effect wholly from the Death of the Teſtator, and that no Regard was to be had to the Time when the Will was made, but the other Juſtices were againſt him in that Point, ſo that his Argument may be turned to conclude againſt the Validity of ſuch a Will; for he would have it, that tho' the Will were made before Marriage, and then the Woman out-lived her Huſband, and died, that the Will took Effect, becauſe every Will took its Force from the Death of the Teſtator only; whereas, if it took Effect from the Time of the Date, and any Regard were to be had to that, then the Marriage would be a Countermand, and ſuch a Will would not be good, which as he took it was ſo, then it being reſolved in that Caſe, that Wills take Effect according to their Date, *Manwood*'s Concluſion from thence muſt be, that the Marriage was a Countermand, and then ſuch Will could not be good, which, as he took it, it was; *quere?* tho' if a *Feme* make a Will, and then marry, it is a Countermand, becauſe ſhe hath not Power of revoking it. If a Perſon *Compos mentis* makes his Will, and afterwards becomes of a *non-ſane* Memory, this is no Countermand, tho' he now have not the Power of Revocation; but the Difference is apparent, for a *Feme covert*, tho' ſhe be a Perſon *Compos*, and capable of making Alterations in her Will, yet for want of Freedom cannot do it; therefore leſt a Will be made good, whether by her Conſent or no, the Law expounds the Marriage to be a Revocation; but a Perſon of

The Will of a *Compos mentis* is good, tho' he be afterwards of *non-ſane* Memory.

of *non-ſane* Memory hath not Reaſon or Underſtanding to alter or revoke a Will, and therefore it can never be preſumed, that the Will muſt ſtand whether he will or no, or that he is in ſuch Circumſtances as not to be able to alter his Will according to his Intent, becauſe he is in ſuch Circumſtances that he cannot have any ſuch Power; and if the becoming of *non-ſane* Memory be a Revocation, perhaps the moſt juſt Settlement for the Proviſion of his Family may be overthrown.

4 Co. 60, 61. In the Caſe of *Force* and *Hembling*, the Woman uſed Words of Revocation, but 'twas agreed that they were of no Force, becauſe *La feme covert* hath no Power of Revocation; yet 'tis ſaid in *Godolphin* that a Will made by a Woman before Coverture, will be good, if ſhe ſurvive her Huſband; and that if ſhe confirm after her Huſband's Death ſuch a Will as was made by her during the Coverture, it will be good; it ſeems ſuch Confirmation may be by Word only, for 'tis within the Statute of Wills, for 'tis a Will in Writing, notwithſtanding the Confirmation be by Word of Mouth only, and the Statute of Frauds and Perjuries did not ſeem to extend to it; for tho' that Act requires that Revocations ſhould be either by Tearing, *&c.* or Writing, it ſays nothing of Confirmation; and tho' if there had been a Revocation in Writing to have revoked it, that became Part of the Will; perhaps to have confirmed the former Will, and to have revoked the Revocation, there muſt have been a Writing, yet barely to confirm a written Will, may, it ſeems be done notwithſtanding the Statute. All the Goods and Chattels perſonal of a *Feme covert* are, by the Intermarriage, abſolutely given to the Huſband, and the Chattels real too, if he ſurvive her; ſo that of neither of them can a *Feme covert*

make her Will without her Husband's Licence; neither can she make her Will of Things in Action without her Husband's Licence; for though they shall not go to him after her Death, the only Interest he can have in them is to recover them during the *Coverture*; yet cannot his Wife make a Will, and constitute an Executor for them without his Consent, for thereby he might be prejudiced; for if she die intestate, he may be her Administrator, and thereby recover them, but of such Things as a Wife has as Executrix, she may make her Will without her Husband's Consent, for he can have no Prejudice. If a *Feme covert* have a Lease by Extent, a Wardship, the next Avoidance of a Church, or the like, the Husband outliving shall have them, but he cannot make his Will of them; and Things in Action he shall not have, tho' he do outlive her; neither can he make a Will of them, tho' he may receive or release them during the Coverture: By the Husband's Licence a *Feme covert* may make a Testament of his Goods: If she make a Will without his Knowledge, and after Probate he delivers the Goods to the Executors, this will make it a good Will; it seems, if he knows she has made a Will, and yet doth not oppose the Probate, yet that will not make the Will good, for the letting the Will be proved to be her Will, is no Assent that her Will shall be performed, but a bare letting it, *Valere quantum valere potest*; but yet, if he do give her Leave to make a Will he may at any Time revoke it before Probate, either before or after her Death; for 'tis requisite that it be his Will as well as her's, which 'tis not, if he declare his Dissent at any Time before the Will be a compleat Will. Notwithstanding Contract of Marriage, a Woman may make her Will, and it shall

Wife may make Will of what she has as Executrix, Wentw. Offi. Ex. 200. Perk. Sect. 502. 11 Mod. 221. pl. 14 *contra*.

Husband can't make a Will of his Wife's Lease by Extent, Avoidance of a Church, &c. nor of Things in Action.

ſhall be good, if ſhe die before Marriage, but if ſhe marry afterwards, 'tis void, unleſs the Huſband agree to it; if the Huſband enter a *Caveat* againſt the Probate of his Wife's Will, 'tis a ſufficient Countermand, though the Will were made by his Licence. A *Feme covert* may not deviſe the Goods ſhe hath as Executrix to another, any otherwiſe than by making an Executor of them; no more can any other Executor, for he hath no Property in them himſelf ſo as to diſpoſe them by his laſt Will, for he hath them only in *autre droit*, and may only, by making an Executor, continue the Truſt. If a Woman *Covert* be Executrix and Legatee, then the Goods becomes her Huſband's, and ſhe can no more diſpoſe of theſe Goods, than of the Goods ſhe hath of her own proper Right before *Coverture*. When an Executor dies, then his Office determines and devolves to his Executor; and therefore, tho' in his Life-time he might diſpoſe of the Goods he had as Executor, for that's but according to the Power and Truſt repoſed in him, yet when he dies, then is his Office determined, and the Office of the other commences, and the other is void, becauſe it is not an Alteration of Property by him that is Executor. The Law allows an Executor Power to diſpoſe of the Goods during his Life, tho' he have them only in *autre droit*, as a Thing abſolutely requiſite, in order for him to diſcharge the Truſt repoſed in him, in order to pay Debts and Legacies, with the Profits ariſing by ſuch a Sale; but when he deviſes them away, he can never pay any Debts, *&c.* becauſe the Deviſe is of no Effect till his Death, and therefore to give him Power to deviſe, would be to no End, and againſt the Nature of his Intereſt, that hath the Goods only in *autre droit*, and

and no Property of his own, and therefore ought not only to have Power to alien in theſe Caſes, where ſpecial Reaſons may be given for ſuch Alienation: Another Reaſon is added in *Grantham*'s Caſe, *viz.* that when the Executor is dead, his Executors have the Goods, *&c.* to the Uſe of the firſt Teſtator, and as Executors to him, and not as Executors to the laſt Teſtator, and ſo by Relation they come in above the firſt Executor, and indeed by this Relation, the Property and Intereſt he had is quite deſtroyed, but only what Acts he did as Executor by virtue of his Authority ſtand good; but his Authority ending and ceaſing with his Life, a Deviſe by him is not good, becauſe then the Authority is transferred to his Executors. *Godolphin* ſaith, that tho' a *Feme covert* may diſpoſe of the Goods ſhe hath as Executrix to another without her Huſband's Conſent, yet the Profits ariſing from ſuch Goods during the Marriage are her Huſband's, and no others, as Executrix; but *quere* well of that Matter? for it ſeems it is not generally true; for if ſhe have a Leaſe for Years, the Profits beyond what will pay the Rent is Aſſetts, or elſe ſhe will have no Aſſetts of that Leaſe; if ſhe of her own Head makes Advantage of the Goods, then it ſeems true enough, as if ſhe let Money ſhe hath as Executrix out to Intereſt, that Intereſt will not be Aſſetts, as it ſeems, becauſe ſhe was not obliged to it, and muſt ſtand to the Loſs at her Peril; but if the Goods were left improveable by the Teſtator, there it ſeems that Improvement will be Aſſetts. Tho' a *Feme covert* be a Perſon diſabled by Law to make a Will, yet if the Huſband covenants that ſhe ſhall make one, tho' afterwards he will not let her make a Will, yet his Covenant is broke, for tho' ſhe be diſabled to make a perfect Will, yet it will be

be ſo far one, as to cauſe a Breach of Covenant in him. To this Purpoſe is the Caſe of *Marriot* and *Kinſman*, the Plaintiff brings Debt upon an Obligation; the Condition of it was, that whereas he had married a Widow, poſſeſſed of divers Goods, if he ſhould permit the ſaid Woman to make her Will, and diſpoſe of Legacies as much as ſhe would, not exceeding 50 *l.* and pay and perform what ſhe appointed, that then, *&c.* the Defendant pleads, that ſhe did not make any Will; upon which the Plaintiff takes Iſſue, and the Jury find that ſhe did make a Will, but that ſhe was *Covert* at the Time of making the Will, and Judgment was for the Plaintiff, for ſhe being a *Feme covert*, could not by Law make a Will without the Aſſent of her Huſband, yet 'twas a Will within the Intent of the Condition, which her Huſband by the Obligation was to perform, which he ought to have done, by delivering the Goods according as ſhe had appointed. And the Caſe of *Crowl.* and *Dawſon* is like this, where a Man gave a Bond, that a Widow he married ſhould enjoy the Goods ſhe had before Marriage, without Diſturbance, Claim, or Interruption from him; the Defendant pleads Performance of Covenants, generally; the Plaintiff aſſigned Breach, that the Woman was poſſeſſed of ſuch Sheep, and the Huſband took the ſaid Goods into his Hands, and then detained, and yet detains, upon which Iſſue is joined, and found for the Plaintiff, and moved in Arreſt of Judgment, that no ſufficient Breach was aſſigned, for that he did not ſhew any Act or Diſturbance, for by the Inter-marriage the Goods are the Huſband's, *ſed non al.* for it being found, that he took and detained the Goods, it muſt be intended a Detainer from the Wife. The Caſe of *Eſton* and *Wood* is to the ſame Purpoſe with

Cro. Car. 219. pl. 5 Cro. Eliz. 27. pl. 9. S. P. ſee Chanc. Caſ. 118.

Cro. Eliz. 804. pl. 9.

Godol. Orph. Leg. 34.

with that of *Kinſman* and *Marriot*. If a *Feme covert* dies inteſtate, Adminiſtration of her Goods may be committed, for ſhe might have Things in Action, which were not given to the Huſband by the Intermarriage: Some Perſons are ſaid to be inteſtable in reſpect of the Diſabilities they lie under from the Want of their principal Senſes, as being deaf and dumb; but 'tis not properly ſaid any Perſon is inteſtable upon that Account, but only as thoſe Diſabilities ſuperinduce a Diſability in the Underſtanding of him that wants theſe Senſes, for that commonly Perſons labouring under the Want of theſe Senſes have not a ſound diſpoſing Memory, ſo as to be able to diſpoſe of their Eſtates with that Prudence and Diſcretion as they ought. Thus Perſons born deaf and dumb are commonly Idiots, and therefore can't make any Will, not but if they have a good Underſtanding, and *Animum teſtandi*, they may make their Wills, and by Signs, and other Expreſſions of their Intentions, diſpoſe of their Eſtates, notwithſtanding the Want of thoſe Senſes, as Perſons may do that become ſo by Accident; ſo a blind Man may make a written Will if it be read to him, and he acknowledges it to be his laſt Will and Teſtament before Witneſſes; ſome Perſons are diſabled from making Wills in reſpect of the Crimes they have committed, in which Caſes this may be taken for the general Rule and Evidence of thoſe Matters, where the Party by his Crimes forfeits his Lands and Goods he is inteſtable, ſo that the Power that is denied him of making his Will, is not taken from the Crime he hath committed, but becauſe he hath nothing to diſpoſe of by Will. Thus ſo far as he forfeits he is diſabled, as if he only forfeits his Goods, he may deviſe his Lands a

Deaf and Dumb, Godol. Orph. Leg. 34. Wentw. Off. Ex. 15.

Blind Man. ibid.

In reſpect of Crimes.

Felo

Felo de ſe. *Felo de ſe*; but Traitors and Felons can neither
Traitors, Felons, ibid. diſpoſe of Lands nor Goods by Will, becauſe they are both forfeited by their Crimes; but thoſe Goods they have as Executors to others, they may diſpoſe of by their laſt Wills, even in the Caſe of Treaſon or Felony, becauſe they are not forfeited, and then pardoned, his Will, as it ſeems,
Outlawed, ibid. ſhall ſtand. Thus Perſons outlawed for Debt forfeit their Goods and Chattels, and therefore of them they can make no Wills; but it ſeems they may make Executors for Debts upon ſimple Contract, which are not forfeited by the Outlawry. If an Exigent of Felony be awarded againſt a Man, he may make Executors to reverſe it, for he is not attaint by the Award of the Exigent, yet it ſeems he forfeits by the Award his Goods
Hereticks, ibid. and Chattels. Hereticks by the Statute of *Hen.* 5. forfeited their Goods; but that Statute is repealed by 1ſt *Eliz.* and they may, as it ſeems, make their Wills of both Goods and Lands, and
Apoſtates, ibid. ſo it ſeems may Apoſtates, *&c.* guilty of Crimes that do not ſuperinduce any Forfeiture; for why ſhould not the Party diſpoſe of them by Will as well as Adminiſtration be granted to them. Any Word in a Will that ſuſpends the Aſſignation of an Executor, in Expectation of ſome future
A conditional Will. Events, makes the Will conditional, and the like of a Legacy makes that conditional; but if the Diſpoſition be made, and only a Burthen or Charge impoſed on that Diſpoſition, that's only a *Modus*, as if *A.* appoints *B.* his Executor, ſo
Ibid. 39. that he pay *C.* 50 *l.* this is only a *Modus*; but if it be upon Condition he pay 50 *l.* that makes the Will abſolute; if the Condition be contrary to the former Part of the Will, 'tis void, as if one makes two his Executors, provided that one ſhall not adminiſter, this is void; if there be a Demonſtration

monſtration in a Will, that is only added a *Deſcriptio perſonæ*, and that is falſe, yet, if the Perſon be known well enough with it, that's ſufficient, as if the Teſtator appoint his Son *Thomas*, who was lately married, to be his Executor, that's well, though he be not married, a Condition properly ought to relate to ſomething in Contingency, that may or may not be, for if it be ſubject to no Contingency, either in Subſtance or Circumſtance, 'tis no Condition; as if *A.* makes *B.* his Executor, upon Condition the Sun riſe ten Days after his Death, he is Executor abſolutely, for there is no Contingency to ſuſpend his being ſo; ſo if the Teſtator make *A.* his Executor, upon Condition the Teſtator's Wife and Daughters be alive at the Time of the Death of the Teſtator, and he never had any Daughter, the Will is abſolute, for there is nothing poſſible to overthrow it; and in ſuch Caſes, where there is nothing to be a Contingency, the adding of a Condition can be interpreted nothing but the making of an illuſory Grant. So captious Conditions that are contrary to the Diſpoſition made, are void, becauſe they can't be ſuppoſed to be made with any other Deſign, than that a Man ſhould avoid his own Grant; ſo a captious Will is void, that is made to depend on the Will of another, unleſs it be in favour of Liberty or in pious Uſes. Neceſſary Conditions either in reſpect of Fact or Law, are of no manner of Force, for 'tis in vain to require that which muſt neceſſarily be impoſſible. Conditions in reſpect of Law, Perſons Nature, or Contrariety, are in themſelves void, ſaith *Godolphen* and neither hinder an Executorſhip or a Legacy. This ſeems plain of Conditions ſubſequent, but of Conditions precedent 'tis more doubtful; for if a Leaſe be made for Life, upon Condition the Feoffee do an im-

What Deſcription of the Perſon good.

Ibid.

Captious Condition.

Captious Will.

Conditions ſubſequent and precedent.

possible thing to have Fee, the Fee in that Case shall never accrue: but perhaps in the Case of Wills, where the Person is supposed to be *Inops concilii*, and there being nothing but an impossible Condition added to stay the Devise, it may pass; but *quære* if a Condition be possible at first, and afterwards become impossible, it makes the Disposition 'tis annexed to void; this may be good in case of a Condition subsequent, if there be no Fault in the Legatee; *quære* Conditions against good Manners void. When the performance of a Condition is hindered by the Will and Providence of God, there the Law doth not allow any feigned Performance, except in the Case of pious Devises, *&c.* in case of Conditions precedent; but for Conditions subsequent, *quære* if the Condition be possible, it must be performed before the Will can take Effect, unless the Party that is to do it be in no Fault, why this is not done, and could not have prevented the Impediment that hath been laid upon the Performance of it, for in such Case the Condition will be reckoned as accomplished, and this may, as it seems, be understood as well of Conditions subsequent as precedent; but the former Part, that the Condition must be performed before the Effect can take place, seems only applicable to Conditions precedent, if he to whom the Condition is to be performed be the Impediment only, why 'tis not done, the Law will look upon it as accomplished. Conditions ought to be performed, strictly as enjoined, unless it appear the Testator respect the End more than the Means, or unless the Party, in whose Favour the Condition was added consent to it, or it be in pious Uses, or in Cases necessary to the Act of Performance; in which Cases, other Means than those prescribed are

Inops consilii. Impossible Condition.

are ſufficient, or equivalent; if the Condition be hindered to be performed by the Teſtator himſelf, then the Condition is reckoned accompliſhed, and ſhall neither hinder the Executor nor Legatee, ſo if the Condition be hindered to be performed by a third Perſon, 'tis reckoned as accompliſhed, unleſs the third Perſon were ignorant of the Condition. Arbitrary Conditions muſt be performed after the Teſtator's Death, not before, unleſs the Condition can be iterated, or refers to a Time paſt. Arbitrary Conditions, impoſed upon an Executor, may be performed at any Time during the Life of the Executor, unleſs the Judge appoint a Time; this it ſeems muſt be underſtood of Conditions ſubſequent. A Legatee muſt perform the Condition annexed to the Legacy as ſoon as may be, unleſs ignorant of it. It is ſufficient for the obtaining the Effect of a Condition, that it was once accompliſhed, tho' it doth not continue. So Conditions caſual and mixed are accounted as accompliſhed, to be performed before the making of the Teſtament, provided the Teſtator were ignorant thereof; but if he were not ignorant, then the Condition remains to be performed. Arbitrary Conditions are ſometimes accounted as performed in Law, tho' they are not ſo in Fact; but caſual Conditions, are not accompliſhed in Law, if they are not ſo in Fact. A caſual Condition muſt be accompliſhed before the Legacy can be due; *quære* if the Condition be ſubſequent, ſo if the Legatee dies before the Accompliſhment of ſuch Condition, the Intereſt he hath can never go to his Executors, *&c.* Arbitrary Conditions.

This it ſeems cannot be underſtood of a Condition ſubſequent, but precedent. The ſame Law of mixed Conditions, when the Condition

is affirmative, the Executor or Legatee cannot obtain the Thing until the Performance of the Condition: Surely this muſt be underſtood of a precedent one. In negative Conditions, if they are not performable during the Life of the Party, he muſt give Security to keep the Condition; but if it be performable during his own Life, he need not when the Condition is in the Affirmative; it muſt be underſtood of the firſt Act only, when in the Negative. The Act of the 2d, 3d, *&c.* if a Man be perſonally bound to perform a Condition, the Performance of it by Chance or Fate will help him, if the Condition be alternative. If negative, it is ſufficient if either Part of it be ſecured from being infringed. *Godolphen* makes no Difference between Conditions precedent and ſubſequent; but ſurely there muſt be a Difference, therefore if a Deviſe be made of a Term to one, upon Condition, that out of the Profits he yearly pay 5 *l.* to *J. S.* this is an arbitrary Condition, and yet ſurely he ſhall have the Term before he pay the Profits; yet *Godolphen* ſays generally, that if the Condition be affirmative, the Party cannot have the Legacy till the Performance. It ſeems, upon what *Godolphen* ſaith, and upon the Reaſon of the Thing, that there is no ſuch Diſtinction to be made in caſe of conditional Legacies or Executorſhips, as Conditions precedent and ſubſequent; for 'tis not like the Caſe of Lands, where the Party adding the Condition may, by his Entry, gain the Lands again, if the Agreement be not performed; but in caſe where an Executor is conditionally appointed, or a Legacy conditionally given, if the Condition be not performed, 'tis impoſſible almoſt to gain the Thing again; for who ſhall do it? and beſides, the Thing may be done. In caſe of arbitrary Conditions, the Executor

Negative Conditions.

Conditional Executor or Legacy.

cutor hath Time during his Life to perform the Condition in, and may enjoy the Executorſhip in the mean time, unleſs the Judges appoint a Time for him to perform the Condition in: before the Condition is extant, the Judge may commit Adminiſtration to him that is Executor, but only for ſo long a Time, as the Condition is not extant; for when that is extant, he may prove the Will, and detain the Goods of the deceaſed as Executor to the Will: it ſeems this muſt be underſtood of caſual and mixed Conditions; for before, 'tis ſaid, the Executor muſt enjoy the Executorſhip, where the Condition is arbitrary; and by the ſame Reaſon it ſeems contrary of a Legacy, for the Law hath tied up the Legatee to perform ſuch Condition, in as much haſte as conveniently he may, and therefore it ſeems he ſhall not have the Legacy till he have performed the Condition, tho' an Executor ſhall have the Executorſhip, becauſe of the Truſt repoſed in him; but yet, if the Judge aſſign him a convenient Time to perform the Condition in, it ſeems before that Time he ſhall not have the Executorſhip, for the allowing him Time ſeems to put the Executorſhip upon that Iſſue. If a Condition come to be performed in a Time to come, and be arbitrary, it ſeems he is Executor, whether the Judge appoint a Time or not, or elſe Adminiſtration muſt be granted to him; for if the Condition be to be performed ſeveral Years hence, yet 'tis nevertheleſs arbitrary, as it ſeems, and ſo may come within the Rule, that where the Condition is arbitrary, that there he is Executor in the interim; and if the Judges appoint ſo long a Time as ſeveral Years to come, if he be not Executor in the mean time, or Adminiſtration be not committed, there will be no Body to pay

Caſual and mixed Conditions.

Debts and Legacies; it ſeems he is Executor; for *Godolphen* ſays, that during the Suſpence of a Condition, the Judge may commit Adminiſtration to ſuch an Executor, during the Time that ſuch a Condition is in Suſpence, but not after 'tis Extant. Notwithſtanding this, and that 'tis very neceſſary in conditional Executorſhips and Legacies, that the Condition be performed before they take place, yet, if the Nature of the Condition be ſuch, or the Time be ſo long before the Performance of the Condition, that 'tis unreaſonable for the Parties to wait; in ſuch Caſes it ſeems the Party ought to enjoy the Thing before Performance of the Condition; as if one be appointed Executor or Legatee of a Term, upon Condition, that out of the Profits thereof, or at ten Years End, he pay 5 *l.* to *J. S.* it ſeems he ought to enjoy the Bequeſt preſently, and not ſtay till the Years are over; but in that Caſe it ſeems Security ought to be put in for Performance of the Condition. Tho' *Godolphen* ſays, that while a poſſible affirmative Condition remains unfulfilled, the Executor or Legatee can't obtain the Executorſhip or Legacy, tho' they put in ſufficient Bond to make Reſtitution, which generally ſeems to be reaſonable; but in this Caſe the Legatee could never perform the Condition by paying out of the Profits, unleſs he had the Term firſt. As to Conditions, the Law ſeems to ſtand thus, if the Condition be arbitrary, then the Judge may appoint a Time for the Executor to do the Condition in; and if he do it not, then is the Condition broken, and the Perſon inteſtate, and ſo Adminiſtration is to be granted to the next of Kin; if the Judge appoint no Time, the Executor hath Time during his Life, and he may take upon him the Executorſhip in the mean time;

but where the Judge appoints a Time, there it ſeems he is not Executor till he hath accompliſhed the Condition: For *Godolphen* ſaith, the Judge may appoint a Time for him to perform the Condition, and to take the Executorſhip upon him; by which he ſeems to ſay, the Condition muſt be firſt performed, if the Teſtator have appointed a Time for the Performance of the Condition: it ſeems Adminiſtration may be granted to the Executor, or elſe he is Executor in the mean time.

If an arbitrary Condition be added to a Legacy, the Legatee muſt perform it in convenient Time, or elſe the Condition is broken. If the Condition be caſual or mixed, Adminiſtration is to be granted to the Executor, till the Condition be extant or deficient, and then he may prove the Will if the Condition be extant, but if deficient then the Will is void; for if a Condition be poſſible, at the Time of the making, and become impoſſible before Performance, the Diſpoſition, the Condition is annexed to, is void, for 'twas the Will of the Teſtator the Will ſhould be of no Effect, unleſs the Condition were performed: when a caſual Condition is become extant, then the Proceedings therein muſt be as in caſe of arbitrary Conditions, as it ſeems, if it be an arbitrary Condition, if the Condition be to be performed by a Stranger, then it ſeems Adminiſtration ought to be granted. If a caſual Condition becomes deficient, Adminiſtration ought to be granted to the next of Kin, and the Adminiſtration of the Executor ceaſes. The Will cannot be proved before the Condition is extant, as it ſeems, when the Condition is not extant, the Judge may grant his Letter *ad colligendum*, and then is the Judge ſuable; and ſuch Perſon as hath ſuch Letter *ad colligendum*, hath no Power to ſell. If one be ap-

Letter *ad colligendum.*

Condition to marry.

pointed Executor or Legatee, upon Condition he do marry with the Conſent and Approbation of another; and if he marry againſt ſuch Conſent, yet he ſhall have the Executorſhip or Legacy; but in that Caſe he is bound to aſk ſuch Conſent to marry, for both theſe Parts of the Condition are lawful, tho' that Part is not that that reſtrains from marrying againſt the Conſent of another, for every Man is at Liberty to marry whom he pleaſes, and therefore Conditions reſtrict ve of that Power are againſt the Law, and void; in this Caſe it ſeems there is no Executors or Legatee ſo as to have the Executorſhip or Legacy veſted before Marriage, and therefore if a Woman be appointed Executrix if *A. B.* marry her, ſhe is not Executrix till ſhe be married to him in this Caſe of Legacy, upon Condition not to marry againſt the Conſent and Approbation of another. If the Deviſe go further, and ſay, "and if the Legatee doth, then another ſhall have the Thing bequeathed," there it ſeems the Condition is good; but *quære.* The Condition to reſtrain Marriage for a Time or Place, in reſpect of ſome Perſon, may be good. Annuity bequeathed by a Man to his Wife for ſo many Years, if ſhe ſhall remain a Widow ſo long, is a good conditional Bequeſt; the Reaſon ſeems to be, becauſe of the particular Intereſt every Huſband ſeems to have in his Wife's remaining a Widow, for thereby ſhe may take care of the Concerns of his Family the more; in reſpect of which he may well allow her a Maintenance for that Time, to ceaſe when ſhe removes herſelf into the Intereſt of another Family. If a meer Stranger give her a Legacy upon ſuch Condition, it ſeems 'tis not good, for there is no more Reaſon to reſtrain a Widow from marrying than a Maid.

If

If any Body gives it that is intereſted for the Family of the Huſband, it ſhould ſeem good. If after ſuch a conditional Legacy of an Annuity, the Deviſor goes on, and deviſes unto his Wife the Dwelling-houſe wherein he now lives, or the half of his Houſhold Goods, theſe do not relate to the Condition preceding, but are abſolute Bequeſts, for that was a renewing Legacy, this but one ſingle Bequeſt. A Legacy of 50 *l.* is deviſed to *A. B.* when ſhe ſhall be married; ſhe dies before Marriage, the Legacy is gone, and her Executors ſhall not have it; but if the Deviſe had been of 50 *l.* towards her Marriage, in that Caſe her Executors ſhould have it, tho' ſhe died unmarried. If one makes his Will, and ſays, that he will add to it, or alter it, that is no Will; for it appears that was not the Teſtator's Intent that it ſhould ſtand for a Will compleat; but if he publiſh it as his Will, and then afterwards ſaith that he will alter it, or add to it, yet the Will is a good Will, for 'twas compleat, and he only ſhewed his Deſign of Alterations; ſo it ſeems, if now a Man ſhould ſign, and have his Will atteſted according to the Statute, and then ſay that he would alter it, that would not be material, for the Will was compleat by Signing and Subſcription. Revocations of Wills may be either by Act in Law, or by the Act of the Party, either for the whole Will, or for Part of the Will; and this Revocation even of written Wills, might have been by Word only, before the 29 *Car.* 2. but that Act extends only to expreſs Revocations by the Party, and not to Revocations by Law, for a Will may notwithſtanding be revoked by Operation of Law, tho' that Operation take no Effect by Writing; the 32 *H.* 8. Chap. 1. only requires the Will to be in Writing, but ordains

Bequeſt on Marriage.

Revocations.

nothing about the Revocation of them, and therefore it has been held a ſufficient Revocation, if the Party by Word of Mouth only declare his Intention for the Revocation of his Will, and ſo was it held in the Caſe of one *Kite*, who revoked a written Will by Word of Mouth, and ſaid that he would alter his Will when he came home, but was killed before he came home: And this Caſe ſeems to be agreed in *Forſe* and *Hembling*'s Caſe, where 'twas held, that a Woman *Covert* could not by Parole countermand her written Will, becauſe the Coverture took away the Freedom of her Will, which implies, that another Perſon having that Freedom, may be revoked, if the Executorſhip of one or more be revoked; yet, if any Executor be left, the Will ſtands good; but if all be revoked, the Will is void; yet it ſeems the Will will remain as a Codicil, notwithſtanding all the Executors are revoked, to be annexed to the Letters of Adminiſtration; and if the Will be a Will of Lands, 'tis a good Will, notwithſtanding there are no Executors, for they have nothing to do with the Freehold of the Lands, *&c.* there can be no Revocation of Legacies among Children, without preciſe mentioning the firſt Will, and the Legacies given to the Children: This may be Law for Goods and Chattels, but for Lands it ſeems it is not, for any Revocation ſeems good for the Advantage of the Heir; the like where there is no Children, if the Deviſe be amongſt Brothers; *&c.* the Reaſon ſeems to be, becauſe when Deviſes are made in favour of Children, ſuch Will is a good and reaſonable Will, and adviſedly made; and therefore, unleſs it appears that the Party had due Conſideration of the Will, by rejecting it, it may be preſumed that he did it in haſte, and not with that Deliberation that

8 Vin. Abr. 133. pl. 1. Mo. 874. pl. 1222.

4 Co. 60 61.

Revocation of Executor.

Revocation of Children's Legacies.

that ſuch a Thing requires, ſeeing Diſpoſition of Eſtate any otherwiſe can't be with that Reaſon and Juſtice. *Godolphen* ſaith, that there can be no Revocation of Legacies among Children, without preciſe mentioning the firſt Will, and the Legacies thereby given; this extends, it ſeems, as well where the Revocation is partial only, as to the Legacy among Children, as where the Revocation is total of the whole Will; for there ſeems as much Reaſon, that the Legacies to Children ſhould ſtand good, where the whole Will is revoked, as where only Part of the Will, *viz.* only theſe Legacies; but it ſeems the other Part of the Will will be revoked. If after a Will and Legacies made among Children the Party makes another Will, and thereby gives the ſame Things he had given to his Children to another, it ſeems this will not be a Revocation of the Children's Legacies, for there ſeems the ſame Prejudice; but then *quære*, whether the firſt Will ſhall only ſtand for the Legacies, then how can there be two Wills; it ſeems the firſt Executor will be Executor for the Legacies among the Children, and the laſt for all the reſt; for a Man may have two Teſtaments of ſeveral and diſtinct Things, if the one be not derogatory to the other, and the Executors accordingly limited. Suppoſe then a Man makes his Will, and gives ſuch and ſuch Things to ſuch Perſons, and limits an Executor generally, and then afterwards comes, and by another Will gives ſome Things not expreſly deviſed before, and limits an Executor generally, it ſeems this Will is a Revocation of the former, for they have both by ſuch Wills a general Authority, ſo that the one is deſtructive of the other. Suppoſe in the laſt Will there had been made a ſpecial Executor only as to thoſe Things deviſed, or

Revocation of Children's Legacies.

What ſecond Will is Revocation of a former.

or as to the perſonal Eſtate of the Teſtator, it ſeems then the Revocation had been but partial, and both Wills might ſtand as a Soldier in actual Service may make two Wills, and both be good, and ſtand to his Intention: This muſt mean, that the Soldier may have the ſame Privilege in reſpect of Wills, that other Perſons have for Codicils; that if in the firſt he gave a Thing to one, and in the laſt to another, they ſhall ſhare the Thing, not that if the Soldier's Wills are contradictory, that they ſhall ſtand, for that is impoſſible; ſo that it ſeems, that if he appoints in his two Wills ſeveral Executors, they ſhall be Executors, and not the laſt Will overthrow the former. If two Teſtaments are found, and it appear not which is the latter, both are null and void; but if one be made *inter Liberos*, or *ad pios Uſus*, that ſhall prevail, or be preſumed to be the latter; or if one be made in favour of him that ought to have Adminiſtration, becauſe that muſt be the next of Kin, and Reaſonableneſs of the Diſpoſition on that Side ought to prevail, and give Grounds for the Suppoſition, that was the Teſtator's laſt Will; and if one be made in favour of the Teſtator's Children, or in favour of him who ought to have Adminiſtration, and the other be made *ad pios Uſus*, if they ſhould have Adminiſtration, were they Teſtator's Children, then ſhall that Will ſtand, for there is more Reaſon in the Proviſion for the Neceſſaries of a Man's Family, than for the Poor, *&c.* But that Will made *ad pios Uſus*, ſhall be preferred before one made in favour of collateral Kindred: It ſeems a Wife ought to be preferred before a Will *ad pios Uſus*; thoſe Diſtinctions ſeem reaſonable in caſe of a Will of Goods, for that, by the Preſumption of Law, in caſe of Wills of Goods, a reaſonable Diſpoſition

Soldiers may make two Wills.

When both Teſtaments void. Show. 550 Parl. Caſ. 147. 3 Mod. 208.

tion is made in favour of the Teſtator's Children, which otherwiſe would go to the Diſpoſition of an Adminiſtrator, and either be his own Goods, or elſe at leaſt come to be divided amongſt the Children or next of Kin; but in caſe of Lands, this Diſtinction ſeems not to carry any Force in Law with it, for there it ſeems both the Wills will be void; for a Will of Land is a Diſpoſition that would thwart and croſs the Diſpoſition of the Law in favour of a Stranger, and in prejudice of the Heir, ſo that a Will of Lands is to bar the Heir's Right, grounded upon Reaſon and Law in favour of a Stranger, who can make no ſuch Reaſon for his having the Lands, and therefore a Will that paſſes by the Heir, ought to have all the Strictneſs it poſſibly can, ſo that the Reaſon of Wills of Goods and Lands lies quite croſs one another, as Revocations may be made by an expreſs Act, ſo may they be made by an Act in Law tantamount to an expreſs Revocation. *J. S.* ſeized in Fee of the Manor of *M.* and in Fee expectant, upon a Leaſe for Years, of the Manor of *G.* deviſed them to *J.* in Fee, and afterwards he covenanted to make a Feoffment of the Manors, which he did by Letter of Attorney, and Livery was made in Poſſeſſion, but not of that in Leaſe, neither was any Atornment; it was clear in this Caſe, that by the Feoffment of the Manor in Poſſeſſion, the Will as to that was revoked, but that the greater Doubt ſeemed to be upon the Manor in Leaſe, but the Opinion of the Court was, that 'twas a Revocation of that alſo, ſince it appeared to be the Intent of the Party to paſs away his Reverſion in the Manor in Leaſe, which tho' it took no Effect, yet 'twas a ſufficient Declaration of the Intention of his Mind, that the Will by him formerly made ſhould not ſtand.

See Poph. 108. pl. 3 Mod. 429. pl. 599. Show. Rep. 544. 2 Salk. 592. pl. 1. Went. Off. of Ex. 22.

ſtand. Another Doubt was conceived upon the Caſe for the Deviſor, after he had altered his Will, by making a new Executor, and the Queſtion was, whether this was any Revivor or new Publication? but this was not reſolved. The ſame Law it ſeems is of a Bargain and Sale by Deed intended, and not enrolled according to the Statute; but in caſe a Man covenants, that he will do any of theſe Acts, this is no preſent Revocation; or if he dies before he does the Act, the Will ſtands good, for all that this can amount to is but to ſhew that he will revoke it. If a Man ſeized of Lands in Fee, deviſes them to another, and afterwards makes a Leaſe, for this is a Revocation of the Will; for now he himſelf is the Cauſe, why his own Will, which was of Force, can take no Effect, which can be expounded to be nothing elſe but a Deſign, that his Will ſhould not ſtand, and the Alteration of the Deviſor's Eſtate in the Land, can be no other Effect than that the Will is revoked, for now it cannot take Effect. It ſeems the making of a Leaſe for Years is no Revocation of a Deviſe in Fee, for it ſeems no ſuch Alteration of the Eſtate of the Deviſor, as to be a Revocation, for he is ſtill Tenant to the *Precipe*, and the Poſſeſſion of his Leſſee is his Poſſeſſion, and he is the Perſon that hath the abſolute Dominion over the Lands; ſo if a Man poſſeſſed of a Leaſe for fifteen Years, deviſes it to another, and then makes a Leaſe to *J. S.* for ten Years, this is no Revocation, for it doth not ſeem to be any great Alteration in his State, for he is ſtill Leſſee for Years, and his Leſſee's Poſſeſſion ſtands for his Poſſeſſion; and 'tis not like the Alteration of an Eſtate in Poſſeſſion to Reverſion, for there the Tenant to the *Precipe* is altered, and he hath but a Return to come in Poſſeſſion hereafter;

2 Salk. 592. pl. 1.

See the preceding Authorities.

after; but if after the Will be made, he take a new Leaſe, whereby the old Leaſe is ſurrendered in Law, then the Deviſe were generally of his Leaſe, not mentioning what Number of Years, yet the Will was revoked, for this new Leaſe was not the Leaſe he willed away by his Will, but another, which he had not at the Time of making his Will, and therefore could not mean it ſo. Wentw. 22, 23.

If one deviſe his black Horſe, and then ſell him, and purchaſe another, the laſt Horſe ſhall not paſs by the Deviſe; ſo if he re-purchaſed the Horſe; for the ſelling was as a plain Declaration that the Will ſhould not ſtand, but the re-purchaſing could be no Signification of his Intent, that the former Will ſhould ſtand: So if one deviſes the Crop in his Barn, and then ſells that, and puts in a new one, this latter ſhall not paſs by the Deviſe, for the Deviſe was only of the former Crop, and not of this. The Statute of Frauds, *&c.* doth not extend to ſuch Revocations as theſe are, it ſeems, for that only extends to expreſs Revocations; and therefore tho' that Statute requires all Conveyances of Land to be in Writing, *&c.* yet ſhould one be made, tho' of none Effect, and atteſted but by one Witneſs, yet ſurely that would be a ſufficient Revocation, notwithſtanding that Statute requires every Revocation to be atteſted by three Witneſſes. Ibid. Ibid.

A. deviſes Lands in Fee to his younger Son, and afterwards by another Will deviſes the ſame Lands to his Wife for Life, rendering Rent to his Son, 'twas held no Revocation: Here is this Particular in this Caſe, that by the Reſervation of the Rent to the Son, it plainly appeared to be the Intent of the Deviſor, that the Son ſhould have the Reverſion; had the Deviſor made a Leaſe for Life, it ſeems it had been a Revocation; but *quære.* A Man makes a Feoffment in Show Rep. 541. Cro. Eliz. 721. pl. 51. ſee Cro. Jam. 691. pl. 3. Cro. Char. 24. pl. 16. 2 Salk. 592. pl. 1. 3 Mod. 204.

in Fee to the Uſe of himſelf for Life, and then to the Uſe of his own right Heirs, that was held a Revocation of a precedent Deviſe to one in Fee, becauſe he parted with the whole Eſtate. A Deviſe is made to one in Tail, the Remainder to another in Tail, and then the Deviſor makes a Leaſe for thirty Years to the Remainder-man, to commence after the Deviſor's Death, this was held no Revocation of the Deviſe, but only for the Term, becauſe they may both ſtand together; but if the Leaſe had been given by the firſt Deviſe, it ſeems it had been a Revocation, as is the Caſe of *Cook* and *Bullock*, where one deviſed Lands to his Siſter in Fee, and afterwards made a Leaſe to her for ſixty Years, to commence after his Death, and delivers the Leaſe to a Stranger, to the Uſe of his Siſter, who delivered it to the Siſter after the Death of the Teſtator, who refuſed claiming a Fee: This was held a total Revocation of the Deviſe, for both the Intereſts were inconſiſtent; but had the Leaſe been made to any other Perſon than the Deviſee, it had been no Revocation. Revocations of Wills ought to be made with all Manner of expreſs certainty, and ſufficiently appear to be intended as Revocations, and therefore *C. E.* made his Teſtament in writing, and gave to his Brothers ſeveral Legacies, and the like to ſeveral other of his Kindred, and made his Wife Executrix, ſaving that he appointed his two Brothers to be conjoined with her as Executors, in Truſt for his Wife for the Performance of his Will, afterwards being ſick, he ſent for *S.* and *D.* who aſked what Friend he thought fitteſt to be his Executor, and take care of his Funeral, *&c.* and whether he truſted any Perſon more than his Wife, he anſwered his Wife was the firſt Perſon, and therefore ſhould be his ſole Executrix; and

Cro. Char. 23. pl. 16. Cro. Jam. 49. pl. 20. See Lit. Rep. 59. Vern. 97. pl. 84. 2 Vern. 496.

How Revocations ought to be made.

3 Mod. 206.

and then being aſked whether he would give any Legacies to his brethren, he anſwered he would not give, nor leave them any thing, but he bequeathed to *Lionel Alwood* his god-ſon 20 *l.* or 30 *l.* and for others, he left them to his Wife's diſcretion, and this being ſet down in a Codicil, was proved together with the Will *in communi formâ*; and whether this were a Revocation of the former Will was a queſtion, and reſolved by Lawyers and Civilians that it was not, for that he ſeemed to have no thought or remembrance of his former Will, and his Expreſſions were doubtful, whether he meant to give any more to his kindred than he had, and a clear and perſpicuous Will ought not to be revoked without expreſs mention made of the Legacies; and that there was a Canon for this, and to this purpoſe, in the Caſe of *Simpſon* and *Kirton*, where one made his Will, and deviſed to *A. H.* and her Heirs; and lying upon his Death-bed, becauſe *A. H.* did not come and viſit him, he affirmed that ſhe ſhould not have any part of his Lands and Goods, and this was held *per tot. cur.* to be no Revocation of the Will, being but by way of Diſcourſe, and there not appearing any Intention in the Words to revoke his Will now *in preſenti*, for a Revocation ought to be of expreſs Words, that he did revoke his Will, and that ſhe ſhould not have his Lands given her by his Will; but theſe laſt Words ſingly and alone import nothing, but that his Intention, that ſhe ſhould not take the Lands, which he might deſign to effect, by altering his Will afterwards, and the Words don't of themſelves import a preſent Revocation, for there appears no Intention of a preſent actual Revocation, for the Meaning that it ſhall not

Cro. Jac. 115. pl. 2.

ſtand, may be that he will do ſomething to annul, and an expreſs Will muſt be overthrown by an expreſs Revocation: If one deviſes Lands to one, and afterwards by Parole deviſes them to another, tho' this be a void Deviſe, yet it amounts to an expreſs Revocation, and the Law ſeems ſo at this Day, notwithſtanding the Statute of Frauds and Perjuries requires every Revocation to be in writing, *&c.* for that ſeems to extend only to expreſs Revocation, and not to Revocations in Law; and ſo, by the ſame Reaſon, it ſhould be of a Will of Goods, and after another is made by Word of Mouth only. A Will ſhall ſtand good notwithſtanding a ſubſequent Will, if the laſt Will be voidable, as if it be ſuſpected that the Teſtater was circumvented by Fraud or Flattery, this may be good Cauſe to avoid a Will for Goods, but not for Lands, unleſs in Equity, as it ſeems; but if a Will, either for Lands or Goods be attained by Violence and Coertion, in ſuch Caſe it ſeems the Will is not good in Law. If in a Will there be a Clauſe, that the Teſtator ſhall not be able to make any other Will, this is a void Clauſe; for no Man can reſtrain his own Power to alter his Will, and therefore, if he make any new Will, this will be good, without any expreſs Mention of his Power, that he had reſtrained by the former Will; but if there be a Clauſe in a Will, that he will not make any new Will, and if he do, it ſhall be void, there a latter Teſtament ſhall not revoke the former, unleſs there be a ſpecial Mention of the derogatory Clauſe, and Words tantamount to a Revocation of it; for without mentioning of it, he doth not ſeem to have any Conſideration of the Clauſe; but it ſeems ſuch a Clauſe would be of no Effect in caſe of Lands, for the laſt Will

is

is a Revocation of all others. One ſeized of Lands in Fee, deviſed them to *J. S.* and afterwards lying ſick, he ſaid *et declaravit*, that his Will made at *P.* ſhall not ſtand, and this was held to be a preſent Revocation, but *quere* what Differences there are between this Caſe and the Caſe of *Cranvel* and *Saunders*, where the Words are, I have made my Will, but it ſhall not ſtand; and held to be no Revocation? This Caſe indeed ſeems to have a more expreſs Reference to his Will, being particularly mentioned, and ſeems to contain a more certain and preſent Deſign of revoking his Will than the other, which ſeems to carry only a general Intent for the revoking his Will. The Statute of Frauds and Perjuries requires Revocations to be in Writing, but *quere* whether there may not be a Revivor of a written Will by Word of Mouth? *Godolphin* ſaith generally, that a Will in Writing of Lands, made void by Word or by Act contradicting ſuch Deviſe, cannot be made good by any verbal Declaration ſubſequent; and in the Caſe of *Brett* and *Ridgen*, 'tis ſaid, that every thing that makes the Will effectual ought to be in writing, by force of the Statute of Wills, which requires that Wills of Lands ſhould be in writing; but the Caſe itſelf, which this is deduced from, doth not warrant any ſuch general Concluſion, which was, that a Man ſeized in Fee of Lands, deviſed them to one and his Heirs, the Deviſee died in the Life of the Deviſor, and afterwards the Deviſor declared, that the Heir of the Deviſee ſhould have the Lands, notwithſtanding the Death of the Anceſtor, and 'twas adjudged he ſhould not take by theſe Words. This indeed is a Caſe clearly out of the Statute of Wills, for there is no Deviſe that will carry the Lands in writing, and a

Crò. Eliz. 306. pl. 6.

Cro. Jac. 597. pl. 3.

Pl. Com. 345. a. Rep. 155. b. Jenk. 124. pl. 50. Jo. 59. ſee 2 Vern. 468. 722. Ch. Pre. 440. 10 Mod. 425. 11 Mod. 156.

verbal Will will not carry them; but this doth not prove, that where there is a good original Will in Writing, that of itſelf, and by the expreſs Mind of the Teſtator ſufficiently declared therein, would paſs the Land, if there were not ſome after Act to overthrow this Will; I ſay this doth not prove, but that ſuch written Will may be revived by Word; for that Will but declares, that a good written Will ſhall take Effect, which is ſufficient to paſs the Lands by the Words therein contained. In the Caſe of *Brett*, the Words of the Will were not ſufficient of themſelves to paſs the Lands, and ſo the Caſes differ, but *quere* if there can be no Revival by Parole of a Will of Lands? becauſe the 32 *Hen.* 8. Chap. 1. 34 and 35 *Hen.* 8. Chap. 5. require the Will ſhould be in Writing; by the ſame Reaſon there can be no * Revival of a written Will of Goods by Parole, becauſe the 29 *Car.* 2. requires that Wills of Goods, except in ſome Caſes, ſhould be by writing, and then no verbal new Publication of any of thoſe written Wills can be good; it ſeems that a Will in Writing, either of Lands or Goods may be revived by a Writing, which need not be atteſted by three Witneſſes, as Wills and Revocations muſt; for the Statute of Frauds and Perjuries only mentions Wills and Revocations, or Alterations, neither of which doth a Revivement ſeem to be. A Will may be revived, ſaith *Godolphin*, either by adding any thing to the Will, or by making a new Executor; as for Lands, this muſt be done in the preſence of three or four Witneſſes, as it ſeems; for the adding to the revoked Will, makes it a new Will in Writing, and then it ſeems it is plainly within the Statute

* *A Will in Writing may be revoked by Parole, and revived again by Parole, Styl.* 343, 418. *Cro. Eliz.* 306, *pl.* 6.

tute of Frauds; if the Will be a Will of Goods, then it ſeems it is ſufficient if two Witneſſes can prove the Alteration, tho' they have not ſubſcribed it; the writing of a new Executor, in a revoked Will, ſeems to be a Revivor of the Will as to Goods, but *quere* whether it be for Lands? for it was doubted in the Caſe of *Montague* and *Jeffries*. If a Man makes his Will, and afterwards makes another, and then lying ſick, his Friends put both the Wills into his Hands, and require him to deliver that which he would have to ſtand for his Will, and he delivers the firſt, this is not any Revocation of the latter, as it ſeems; for by the Statute it is required, that every Revocation ſhould be in Writing, or by the Obliterating, *&c.* of it, and this is neither, and ſeems to have all the Inconveniencies of Incertainty the Statute was made to prevent; if there be two Wills of the ſame Date, and under the ſame Seal, and it cannot be known which was made firſt, they are both reputed as one Will, and the Executors are joint Executors; this ſeems reaſonable, for that they being both made at one and the ſame Time, it cannot be preſumed any otherwiſe, than that the Teſtator deſigned they ſhould both ſtand as his Will; for there is no Ground to imagine he was ſo variable, as to deſign one Will as the Revocation of the other; they were both made the ſame Day, but Sealing being only required by the Civil Law, ſuppoſe they are not ſealed, or one is ſealed, and the other is not, there ſeems the ſame Reaſon for making them one Will; or if they were ſealed, for that's a Circumſtance required only by the Civil Law. A Will *ad pios uſus*, of the ſame Date with another, in which one is appointed Executor, that is in Poſſeſſion, ſhall prevail before the other, if

Perkins, Sect. 479.

Two Wills as one.

that be not made in favour of the Teſtator's near Kindred; if in one of the Teſtaments be written the very Hour of the Day in which it was made, that ſhall be preſumed to be the latter Will; this ſeems to hold Place as well for Lands as for Goods, for the adding the very Hour, ſeems to have been done with a Deſign to overthrow all Wills precedent. If in one Will an Executor be appointed that's in Poſſeſſion, that Will ſhall prevail before another, if not a privileged Will. If one Will be *ad pios uſus*, and the other in favour of collateral Kindred, Poor and in Poſſeſſion, or Poor tho' not in Poſſeſſion, that in favour of Relations ſhall take place; but if ſuch Teſtaments, of one and the ſame Date, be both *ad pios uſus*, then that which hath moſt Piety ſhall prevail. If an Infant or *Feme covert* make their Wills, and publiſh them at full Age, and after the Death of the Huſband, *quere* whether their Wills ſhall ſtand? Every Teſtament, after the Teſtator's Death, ought to be ſufficiently proved before competent Judges in the eccleſiaſtical Court, which muſt be before the Biſhop, or his Official of that Dioceſe where the Party had his Habitation. A Teſtament may be proved either before the Biſhop or his Official; for it is but a miniſterial Act, and no way concerns the Biſhop as Biſhop in his ſpiritual Capacity, and therefore he may do the Thing by another, for originally Probate of Wills did not belong to the eccleſiaſtical Judges; but when Excommunication is to be certified, then the Biſhop himſelf muſt certify, for that relates to him as a Biſhop; but there are ſeveral Caſes wherein Teſtaments need not to be proved before the Biſhop, *&c.* and where by Reaſon they are to be proved in the Court

Wills of Infants and *Femes coverts* publiſhed after full Age, and Death of Huſband, Plow Com. 344. 11 Mod. 157. Sid. 162. Dy. 143. Raym. 84.

Excommunication to be certified by the Biſhop himſelf.

Court of the Lord of the Manor, or when the Teſtator died within ſome particular Juriſdiction, for then it belongs to the Judge of the Peculiar; or where any Lands, Tenements, and Hereditaments are deviſed, for they have nothing to do with thoſe in the ſpiritual Courts; or where the Teſtator died, having *bona notabilia*, there Probate belongs to that Archbiſhoprick within whoſe Province the *notabilia* are; or where by Cuſtom the Probate belongs to the Mayor of ſome Borough, and in reſpect of the Burgeſſes within ſuch Places deviſeable; but as to Goods, the ſame Wills may alſo be proved before the Ordinary. The Probate of a Will in itſelf void, doth not make it good, for that only ſhews there was ſuch a Will, but gives no Life or Effect to that Will; if the Executor appears not to prove the Will upon the Ordinary's Proceſs, but ſtands in Contempt, he is excommunicable; but if he appears and makes Oath, that the Teſtator had *bona notabilia* in divers Dioceſes, or within ſome peculiar Juriſdiction, then that wherein he died is to be diſmiſſed, to prove the Will in the Archbiſhop's Courts, and to exhibit the ſame under Seal within 40 Days next after. The judge may either *ex officio*, or at the Inſtance of the Party intereſted, compel the Executor to prove the Will; ſome ſay he may be cited at the Inſtance of any Perſon, to know whether the Party inſtancing hath any Legacy left him, or not; the Time for proving the Will, is left to the Diſcretion of the Judge, according as the Circumſtance of the Caſe would admit, but regularly it ought to be exhibited within four Months after the Teſtator's Death, as the Ordinary or Metropolitan then ſhall require, may ſequeſter the Teſtator's Goods till the Executors prove the Will. If it be uncertain whe-

Probate of Wills in Courts of Lords of Manors, Went. Off. of Ex. 43.

Before Mayor of Borough, Went. 45. Godolph. 58.

Godolph. Orph. Leg. 58, 59.

Went. 44 Rol. Abr. 908. Dy. 305. ſee Lev. 78 Cro. El. z. 719.

Godolph. Orph. Leg. 60.

Godolph. Orph. Leg. 61. 62.

whether the Teſtator is dead or alive, it muſt be left to the Diſcretion of the Judge, to determine whether he thinks him dead or alive; if there be good preſumptive Evidence in Law to think him dead, then he muſt prove the Will, as if he be beyond Sea in remote Parts, and it is common and conſtant Fame that he is dead, eſpecially if the Executor of ſuch Perſon be honeſt, and the Goods are *bona peritura*, and the Teſtament itſelf in favour of Children, or *ad pios uſus*.

TESTAMENTS may be proved either in common Form, as where there is no Conteſt about the Will, but the Executors preſenting the Will before the Judge, without citing the intereſted, doth depoſe the ſame to be the true, whole, and laſt Will of the Teſtator, and thereupon the Judge allows the Will of the Teſtator, and fixes his Seal and Probate to it. Or a Will may be proved in Form of Law, when it is exhibited before the Judge, in Preſence of the Parties intereſted, as the Widow and next of Kin, and then the Proof examined and fully heard, and at laſt allowed. The Difference between the two Probates is this, where a Will is proved *in communi formâ*, it may at any Time afterwards, within 30 Years be queſtioned and called in Debate, which it cannot be in caſe it be proved in Form of Law. The Probate of every Biſhop's Will, though he had Goods, but in his own Juriſdiction, belongs to the Archbiſhop of the ſame Province. The Probate of Teſtaments did not belong originally to eccleſiaſtical Juriſdiction, but to the reſpective Lords of Manors where the Teſtator died, as all other Matters did; but the Probate was afterwards given to the ſpiritual Courts by ſome Acts of Parliament. The Ordinary may ſequeſter the Goods till the Executors Adminiſtrator

Godolph. Orph. Leg. 62.

Godolph. Orph. Leg. 62.

4 Inſt. 335.

Probate of Teſtament originally belonged to Lords of Manors. Lindwood 174. Wilkins 78. Lamb. Saxon Laws 64. Seldon's Eadmerus 167, 168. Pl. Com. 179. 9 Co. 38. ſee Perk. Sect. 486.

miniſtrator by Proofs may compel the Executor to refuſe to adminiſter; and if no Body will take Adminiſtration, the Ordinary may grant Letters *ad colligendum bona defuncti*. The Executor muſt make an Inventory of the Deceaſed's Goods, in the Preſence of 2 of the Teſtator's Creditors, or Legatees, or in their Abſence or Refuſal, in the Preſence of two other indifferent Perſons, which Inventory is to be indented and atteſted for Truth by the Executor's Oath, and one Part thereof to be left with the Ordinary. If the Executors refuſe to appear upon Summons and Proceſs, they are puniſhable for Contempt; Refuſal *in pais* is nothing, but it muſt be made in Court, and entered and recorded in Court. In caſe the Ordinary himſelf be made Executor, he may refuſe before the Commiſſary. When an Executor hath once adminiſtered, he cannot afterwards refuſe to prove the Will, becauſe by the Adminiſtration he accepts the Executorſhip upon him, and ſo hath made his Choice; therefore in that Caſe the Ordinary ought to compel him to accept the Executorſhip, and prove the Will; yet it ſeems, if the Judge, knowing that one hath adminiſtred, yet notwithſtanding accepts his Refuſal, and commits Adminiſtration, that is good, for the ſpiritual Judge is the proper Judge of the Matter; but after Refuſal and Adminiſtration committed to another, the Executor may not recede from it, and go back to prove the Will, and aſſume the Executorſhip. But if Adminiſtration be committed only, becauſe the Executor did not upon Proceſs and Summons appear to prove the Will, the Executor may at any Time afterwards, come in and prove the Will. If after the Executor hath refuſed, and the Ordinary committed Adminiſtration, it appears to the Ordinary that the Executor

when Ordinary may grant Letters *ad colligendum*.

Executor to make Inventory, ſee 21 Hen. 8. Ch. 5. Sect. 4.

Went. 36, 37. Godolph. 140. Vaugh. 144.

Went. 37. ſee Cro. Eliz. 92. Ow. 44. Mo. 272. Leon. 137.

Went. 37.

Executor cannot refuſe to adminiſter after Probate, Godolp. 141. Sir Thomas Jones 72. 2 Mod. 146. Ventr. 303. 2 Lev. 182.

Rol. Abr. 907. Went. 40, 41.

Ibid.

Ibid.

tor had adminiſtered before, and ſo determined his Election, he may revoke the Letters of Adminiſtration, and enforce the Executor to prove the Will: If an Executor hath once adminiſtered, tho' he afterwards refuſed before the Ordinary, yet it ſeems he ſtill lies liable to Creditors, for the Plea is *ne unquies Exr. ne unquies Adm. com. Exr.* ſo that if a Man be made Executor, and adminiſters ſome of the Goods, and then refuſes before the Ordinary, and he commits Adminiſtration to *B.* who is ſued by a Creditor, and he pleads this ſpecial Matter, this is held to be a good Plea; but if this be a good Plea, then how can the Ordinary accept of an Executor's Refuſal after Adminiſtration; if an Appeal be had from the Probate of a Will, *quere*, whether or no hanging that Appeal, the Executor may have an Action? *quere*, Executors being in Suit which ſhould be Executor, the Ordinary *pendente lite* may not commit Adminiſtration; falſe *Engliſh*, or Words miſpelled in a Will, or other common Miſtakes, ſhall not prejudice a Will, if there appear the Intent of the Teſtator ſufficiently demonſtrated; and if a Will want a Concluſion, as in Witneſs whereof, *&c.* yet is the Will good enough, without it be *Gavel-kind*, and *Burrough Engliſh* Lands were by Law deviſeable at common Law by Force of Cuſtom, for the Heir having no more Intereſt in that, than in any other, he was not reſtrained from aliening by Will, which in other Caſes he was in favour of the Heir; a Rent *de novo* granted out of ſuch Land or Houſes built upon it, were deviſeable at common Law, in reſpect the Land itſelf was deviſeable.

Leon 154. 155. Went. 38, 40, 41. Mod. 213. 12 Mod. 441, 471. 2 Wil. Rep. 145. 3 Wil. Rep. 251, 337.

Off. Ex. 57. Godolph. 64.

Co. rep. 33.

It ſeems he may Rol. Rep. 226.

Mo. 636.

Godol. 84.

Co. Lit. 111a. Rol. Abr. 609.

A MAN deviſes his Land to *J. S.* and then makes a Feoffment to the Uſe of his laſt Will; though

though the Feoffment be a Revocation, yet it having Relation to the Will, amounts to a new Publication; if one deviſe Lands, and afterwards alien them, and purchaſe them, if he ſhews afterwards by Word or otherwiſe, his Intent that this Will ſhould ſtand, this will amount to a new Publication, and the Lands ſo deviſed will paſs; ſo if a Man makes his Will, and deviſes all his Lands in *D.* and afterwards purchaſe more, and then ſaith, that his former Will ſhall ſtand, or adds a new Codicil to it, this will make the Lands newly purchaſed paſs, but the writing of a new Executor or Superviſor in a Will will not amount to a new Publication of a Will of Lands.

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